

89-1741

NO. _____

Supreme Court, U.S.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

DR. JOSEPH MURRAY HAYSE PETITIONER

V.

BOARD OF TRUSTEES OF THE
UNIVERSITY OF KENTUCKY RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE KENTUCKY SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. In a action under 42 U.S.C. §1983, is a university professor entitled to the remedy of reinstatement with promotion and tenure, rather than an order directing the Respondent, Board of Trustees, to consider the professor's tenure application under the regulations pertaining thereto when tenure was denied, where there were no circumstances warranting denial of reinstatement, and the professor had proved that but for the violation of his 1st Amendment, Equal Protection and Due Process rights, he would have attained tenure, and thus promotion and continued employment?

PARTIES

The caption of the case in this Court contains the names of all parties.

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OPINIONS BELOW

The Opinion of the Kentucky Supreme Court, rendered November 9, 1989, is reported at 782 S.W.2d 609 (1989). (Appx., pp. 1a-17a).

The Opinion of the Kentucky Court of Appeals rendered December 11, 1987, as modified April 1, 1988, is unreported. (Appx., pp. 18a-30a).

The Opinion of the Kentucky Court of Appeals rendered February 26, 1982 is unreported. (Appx., pp. 52a-56a).

The Opinions of the Franklin Circuit Court (1) reinstating Petitioner, with promotion and tenure, dated March 19, 1986 (Appx., pp. 43a-45a); (2) granting, *inter alia*, Respondent's motion for judgment notwithstanding the verdict, dated July 3, 1986 (Appx., pp. 31a-38a); and (3) the summary judgment for Respondent on the former appeal, dated May 27, 1981, (Appx., p. 57a) are not reported.

JURISDICTION

The Kentucky Supreme Court issued its opinion on November 9, 1989. The order denying the Petition for Rehearing was entered on February 8, 1990. This Petition is filed within 90 days after the entry of the order denying Respondent's Petition for Rehearing.

The ground on which the jurisdiction of this Court is invoked is that the final judgment, rendered by the highest court in the State of Kentucky in which a decision could be had, is reviewable by this Court by writ of certiorari where any right set forth is specifically claimed under the statutes of the United States.

Petitioner claims redress for the deprivation of 1st and 14th Amendment rights pursuant to 42 U.S.C. §1983 by the equitable remedy of reinstatement, with promotion to the rank of Associate Professor, with tenure, at the University of Kentucky. The trial court initially granted that relief.

The remedy fashioned by the Kentucky Supreme Court directed the trial court to enjoin Respondent to consider Petitioner's application for tenure, *ab initio*, under the rules and regulations pertaining thereto at the time tenure was denied.

Even though the state court has remanded this case for further proceedings, the judgment of the state court is "final" within the meaning of 28 U.S.C. §1257 because the critical federal question of remedy under §1983 has already been answered by the state court. *Mississippi Power v. Moore*, 487 U.S. ___, 101 L.Ed.2d 322, 337, n.11, 108 S.Ct. ___ (1988).

The jurisdiction of this Court to review the opinion and judgment of the Kentucky Supreme Court is invoked pursuant to 28 U.S.C. §1257.

U. S. CONSTITUTIONAL PROVISIONS INVOLVED

FIRST AMENDMENT

Freedom of religion, speech and press; rights of assembly and petition. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT

Section 1. ... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

This case involves 42 U.S.C. §1983, which provides:

Every person who, under color of any statute, ordinance, custom or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Beginning in 1971, by a series of 1 and 2 year untenured contracts, Petitioner (Hayse) was continuously employed, first as an Instructor, and later as an Assistant Professor, in the Honors Program at the University of Kentucky.

The University has a 7-year "up-or-out" policy. Tenure must be attained before the end of the 7th employment year, or the professor is terminated. Hayse applied for promotion to the rank of Associate Professor in the Honors Program, with tenure, during the 1976-77 academic year, his 6th employment year.

Hayse's application, conforming to University documentation requirements, was forwarded to Dean John B. Stephenson, a Defendant below. Dean Stephenson reviewed Hayse's application, denied it (contrary to University regulations) and failed to forward it to the appropriate Vice-President (contrary to University Regulations).

Hayse was given a 1-year terminal reappointment for the 1977-78 academic year, with the understanding that Hayse could reapply for promotion with tenure during the 1977-78 academic year. Hayse reapplied, but Dean Stephenson again denied his application, and again failed to forward the application to the appropriate Vice-President.

Under the University regulations, Dean Stephenson should have reviewed Hayse's application, appended his recommendation, and forwarded it to the Vice-President for Academic Affairs. The Vice-President was to review the application, append his recommendation, and forward it to the University President for his recommendation to the Board of Trustees which, alone, had the power to approve or disapprove Hayse's application.

After Dean Stephenson's second rejection of Hayse's application, Hayse pointed out to Stephenson that he (Stephenson) had not complied with University regulations.

After some machinations by Stephenson and the Vice-President, which did not include forwarding Hayse's application to the University President¹ for his recommendation nor submission to the Board of Trustees for final approval or disapproval, Stephenson notified Hayse on May 5, 1978, that his reapplication had been rejected. Thereby, Hayse's employment at the University of Kentucky was terminated at the end of the 1977-78 academic year.

On March 28, 1979, Hayse commenced this action against Stephenson and Respondent, Board of Trustees of the University of Kentucky (sometimes hereinafter, "the University") under a state statute, not here pertinent, authorizing such actions. By Amended Complaint, Hayse asserted claims against the Board of Trustees and Stephenson, directly under the 1st Amendment and the Due Process and Equal Protection Clauses of the 14th Amendment.

Hayse's 1st Amendment claim was premised upon the claim that Stephenson penalized Hayse by rejecting Hayse's application(s) for tenure and promotion, because Hayse was recruited by, and had a close association with, Dr. Robert Evans, Director of the Honors Program. There was an internal dispute raging between Stephenson and Evans over the policies and structure of the Honors Program.

¹ Contrary to the statement of the Kentucky Supreme Court (Appx., p. 4a), Hayse's applications never reached the desk of the University President.

On May 27, 1981, the trial court decided, inter alia, that the University's actions did not violate any constitutional right of Hayse and summary judgment was entered against him. Appx., p. 57a.

By unreported Opinion, Appx., pp. 52a-56a, the Court of Appeals reversed summary judgment, holding that Hayse's Due Process and Equal Protection rights had been violated, but that Hayse's 1st Amendment claim created a jury question. The trial court was thus directed to try Hayse's 1st Amendment claim under the rationale of *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977).

Upon remand, Hayse amended his Complaint to assert claims for the deprivation of his 1st Amendment and Due Process and Equal Protection rights under 42 U.S.C. §1983. Without objection, jury trial was had both on Hayse's claims directly under the U.S. Constitution and his identical claims under §1983.

Pursuant to instructions, submitted under the rationale of *Mt. Healthy*, the jury found that the Board of Trustees and Stephenson had violated Hayse's 1st Amendment (freedom of association) and 14th Amendment (Equal Protection and Due Process) rights in rejecting his application(s) for promotion to the rank of Associate Professor, with tenure.

The jury also found that the Board of Trustees and Stephenson had not proven that Hayse would have been denied promotion with tenure by the Board of Trustees and Stephenson in the absence of Hayse's constitutionally protected conduct. A damages judgment against the Board of Trustees and Stephenson was entered to that effect. Appx., pp. 46a-48a.

Incorporating the jury's findings of fact, the trial court entered a Final Order reinstating Hayse to his employment at the University with promotion to the rank of Associate Professor with tenure, effective at the beginning of the 1978-79 academic year, with employment to begin with the 1986-87 academic year. Appx., pp. 43a-45a.

Thereafter, however, the trial court sustained the University's motion for judgment notwithstanding the verdict, and contemporaneously set aside its reinstatement injunction. Appx., pp. 39a-42a.

At the intermediate appellate level, the Kentucky Court of Appeals, inter alia, reversed the judgment notwithstanding the verdict, and directed the reinstatement of Hayse at the rank of Associate Professor, with tenure. Appx., pp. 18a-30a.

On discretionary review, the Kentucky Supreme Court, inter alia, affirmed the Court of Appeals' reversal of the judgment notwithstanding the verdict, but reversed the Court of Appeals, insofar as it had directed reinstatement with tenure. Instead, the Kentucky Supreme Court directed the trial court to enjoin the Board of Trustees to consider Hayse's application for tenure and promotion, *ab initio*, "under the Rules and Regulations pertaining thereto at the time tenure was denied him." Appx., pp. 1a-17a, at 14a.²

The Federal Question of Adequacy of Remedy Under §1983 Was Timely and Properly Raised:

The modified injunctive relief fashioned by the Kentucky Supreme Court had not been contended for by Respondent at

² The remedy fashioned by the Kentucky Supreme Court properly assumes the absence of any special circumstances warranting denial of reinstatement, foreclosing any argument by the Respondent to the contrary. Respondent did not plead nor did it prove, either during or after the trial, any circumstances militating against Hayse's reinstatement.

any stage of the proceedings. Therefore, the first and only opportunity Hayse had to address the issue of the inadequacy of the remedy fashioned by the Kentucky Supreme Court, was by Petition for Modification and Extension of the Opinion. Appx., pp. 60a-75a.

By his Petition, Hayse argued that while the form of injunctive relief fashioned by the Kentucky Supreme Court might, although Hayse did not concede it, vindicate the deprivation of Hayse's Due Process rights, submission of his application to the Board of Trustees for consideration could not vindicate the deprivation of his 1st Amendment nor Equal Protection rights.

Hayse pointed out that a trial under the rationale of *Mt. Healthy* is a "purposeless exercise," Appx., 68a, if upon failure of the Board of Trustees' proof burden under *Mt. Healthy*, the Board of Trustees is merely directed to make the employment decision again.

In addition, Hayse asserted that submission of his application to the Board of Trustees, a party litigant in this action since 1979, could not comport with due process.

By its Order of February 8, 1990, overruling Hayse's Petition for Modification and Extension of the Opinion, the Kentucky Supreme Court rejected Hayse's contentions. Appx., p. 59a.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With Applicable Decisions Of This Court.

The Kentucky Supreme Court fashioned a singularly uncommon remedy purporting to vindicate the violation of Hayse's 1st and 14th Amendment rights. Because the Respondent is vested thereby with the power to decide

Hayse's fate as to reinstatement, it conflicts with *Felder v. Casey*, 487 U.S. ___, 101 L.Ed.2d 123, 140, 108 S.Ct. ___ (1988), a §1983 action, which held that it was plain

... that Congress never intended that those injured by governmental wrongdoers could be required, as a condition of recovery, to submit their claims to the government responsible for their injuries.

Mt. Healthy, at 429 U.S. 274, 283-284, 50 L.Ed.2d 471, 481 held that a public employee, though untenured, "may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected 1st Amendment freedoms."

Perry v. Sindermann, 408 U.S. 593, 597, 33 L.Ed.2d 570, 577, 92 S.Ct. 2694 (1972) held that a college teacher's claim to re-employment for violation of 1st and 14th Amendment rights was not defeated by his nontenured status. Permitting the government to deny a benefit to a person because of his constitutionally protected speech or associations would penalize and inhibit the exercise of those freedoms and allow the government to "produce a result which [it] could not command directly."

The Decision Below Conflicts with the Decisions of the United States Courts of Appeals for the 11th, 5th, 6th, 9th and 1st Circuits.

No U.S. Circuit Court of Appeals has authorized a public employer to decide whether a public employee should be reinstated, where loss of employment was because of 1st Amendment protected conduct. Regardless of the Circuit, it is the *trial court* which is empowered to decide the reinstatement issue. The rule to be applied by the trial court when deciding the reinstatement issue, however, varies among the Circuit Courts of Appeals.

At one end of the spectrum, the Courts of Appeals for the 11th, 5th and 6th Circuits apply a rule of presumptive entitlement to reinstatement, where public employees have been terminated in violation of their 1st Amendment rights.

The Court of Appeals for the 9th Circuit has adopted a rule that reinstatement is required only where the public employee's termination was because of the exercise of 1st Amendment-protected conduct, or race-based. Otherwise, it is discretionary.

At the other end of the spectrum, is the Court of Appeals for the 1st Circuit which follows a rule that reinstatement under any circumstances is always discretionary with the trial court.

In *Allen v. Autauga County Board of Education*, 685 F.2d 1302 (11th Cir. 1982) the Eleventh Circuit Court of Appeals held that there is a presumption of reinstatement in cases where an employee has been terminated for the exercise of 1st Amendment rights. Reversing the trial court which had denied reinstatement to several non-tenured school teachers who had been fired for exercising their 1st Amendment rights, the court held that "reinstatement is a basic element of the appropriate remedy in wrongful employee discharge cases and, except in extraordinary cases, is required." *Id.* at 1305.

The Court went on to announce a "rule of presumptive reinstatement" applicable regardless of the problems reinstatement might cause at the workplace. *Id.* 1306.

The Eleventh Circuit in *Allen*, at 1305-1306, relied upon a long line of Fifth Circuit Court of Appeals cases to like effect, including *Kingsville Independent School District v. Cooper*, 611 F.2d 1109, 1114 (5th Cir. 1980), which held that because the untenured teacher would not have been discharged but for her 1st Amendment protected activity, she was entitled to

backpay from the time of her termination until effective reinstatement. See also *Williams v. City of Valdosta*, 689 F.2d 964, 977 (11th Cir. 1982) (firefighter whose job was abolished and who was demoted because of his 1st Amendment activities was entitled to reinstatement, absent "special circumstances").

The rule of the Sixth Circuit Court of Appeals is to the same effect. See *Banks v. Burkich*, 788 F.2d 1161, 1164 (6th Cir. 1986) (truant officer not rehired because of exercise of 1st Amendment rights, was presumptively entitled to reinstatement).

The Ninth Circuit holds that although reinstatement is an *available* remedy, in certain cases such as termination from employment because of the plaintiff's exercise of 1st Amendment rights, or because of racial discrimination, reinstatement is "required," absent some "special circumstances." See *Banks v. Burkich*, 788 F.2d 1161, 1164 (6th Cir. 1986) *Wagel v. Murray*, 546 F.2d 1329, 1336 (9th Cir. 1977), *vacated and remanded in light of Mt. Healthy*, 431 U.S. 935 (1977), *rev'd on Mt. Healthy grounds*, 560 F.2d 401 (9th Cir. 1977) (high school teacher fired because of his exercise of 1st Amendment rights was entitled to reinstatement because there were no "special circumstances" warranting denial). Compare *Brady v. Gebbie*, 859 F.2d 1543, 1552 (9th Cir. 1986), *cert. denied*, 109 S.Ct. 1577 ("[T]here may be a right to reinstatement when another substantive right coexists with the right to procedural due process.").

The rule of the First Circuit Court of Appeals is that reinstatement in a §1983 employment case is always within the trial court's discretion. In *Rosario-Torres v. Hernandez-Colon*, 889 F.2d 314, 320-322 (1st Cir. 1989), several Puerto Rican civil servants prevailed in their §1983 suit against their

employer, where they challenged their dismissal as violative of the 1st and 14th Amendments, as being politically based, but were denied reinstatement.

The Court, affirming, ruled that:

... when we say that reinstatement is "available," but not "inevitable," we mean that reinstatement is a remedy which lies within the discretion of the trial court.

Id. at 321. The *Rosario-Torres* Court recognized that other Circuits take a different view of reinstatement, i.e., the rule that reinstatement is a "presumptive remedy in section 1983 cases." *Id.* at 322. However, it declined to follow those cases.

Whether reinstatement is an *entitlement* of a §1983 plaintiff who has proven that he has lost employment solely because of the deprivation of 1st and 14th Amendment rights is an important federal question. By granting this Petition to resolve the question, the conflicting rules of the various circuit courts of appeals will be settled.

On the other hand, the decision of the Kentucky Supreme Court is so patently erroneous, and in such conflict with other jurisdictions, Hayse submits that it is appropriate that this Court grant this Petition and simultaneously and summarily reverse the judgment below, with direction that Hayse be reinstated in accordance with the trial court's initial reinstatement judgment. Appx., pp. 43a-45a.

CONCLUSION

WHEREFORE, Petitioner prays that his Petition for Writ of Certiorari to the Kentucky Supreme Court be granted to review the decision thereof, with proceedings pursuant to the Rules of this Court.

Respectfully submitted,

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APPENDIX



RENDERED: November 9, 1989

TO BE PUBLISHED

Supreme Court of Kentucky

88-SC-283-DG

88-SC-289-DG

BOARD OF TRUSTEES OF THE
UNIVERSITY OF KENTUCKY AND

DEAN JOHN B. STEPHENSON APPELLANTS

ON APPEAL FROM COURT OF APPEALS

V. 86-CA-1826

(FRANKLIN CIRCUIT COURT NO. 79-CI-437)

DR. JOSEPH MURRAY HAYSE APPELLEE

AND

DR. JOSEPH MURRAY HAYSE CROSS-APPELLANT

ON APPEAL FROM COURT OF APPEALS

V. 86-CA-1902

(FRANKLIN CIRCUIT COURT NO. 79-CI-437)

BOARD OF TRUSTEES OF THE
UNIVERSITY OF KENTUCKY AND

DEAN JOHN B. STEPHENSON CROSS-APPELLEES

OPINION OF THE COURT BY JUSTICE LEIBSON

REVERSING AND REMANDING

This is an action by a former University of Kentucky Professor, Dr. Joseph M. Hayse, seeking damages against the University of Kentucky Board of Trustees and Dr. John B. Stephenson, who was then the Dean of Undergraduate Studies, for wrongfully terminating his employment, and also seeking reinstatement and award of tenure.

We do not write upon a clean slate. The Kentucky Court of Appeals established the law in this case in an unpublished opinion rendered February 26, 1982, in *Hayse v. Board of Trustees of the University of Kentucky and Stephenson*, 81-CA-1604-MR. Under the finality doctrine, the issues as adjudicated in that Opinion, explicitly or implicitly, were thereafter the "law of the case," binding on remand and binding on this second appeal. See *Burkett v. Board of Ed. of Pulaski County*, Ky.App., 558 S.W.2d 626 (1977); *City of Louisville v. River Excursion Co.*, 253 Ky. 95, 68 S.W.2d 792 (1934); and a host of cases cited in Vol. 2, *Kentucky Digest*, Appeal and Error, §§ 1096-1099. This rule applies with equal force when the prior opinion is unpublished (*Penco, Inc. v. Detrex Chemical Industries, Inc.*, Ky., 672 S.W.2d 948 (1984)), and when the issue urged as improperly decided is constitutional (*Madden's Ex'r. v. Commonwealth*, 277 Ky. 343, 126 S.W.2d 463 (1939), aff'd, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940)).

This case has a long history. In 1971, Hayse was employed as an instructor in the University of Kentucky Honors Program. Hayse had been recruited by Dr. Robert O. Evans, Director of the Honors Program, while Hayse was a Ph.D. candidate in Comparative Literature at the University of Wisconsin. In June 1976, Hayse was promoted to Assistant Professor and remained in such position through June 1978. During the academic year of 1976-77, through his Director, Dr. Evans, Hayse submitted an application for promotion to the level of Associate Professor, with tenure. Stephenson, as Dean of Undergraduate Studies, had supervisory authority over the Honors Program. Hayes (sic) claims his employment was terminated in violation of First Amendment rights to freedom of association and Fifth Amendment guarantees of due process because of a raging internal dispute between Stephenson and Evans involving

differences over the Honors Program.

Hayse was recommended for tenure by his Department Chairman, Dr. Evans. This recommendation was forwarded to Stephenson, who rejected his application. Hayse was then given a one-year terminal appointment in which to seek another position. Hayse made a second application for tenure during the 1977-78 academic year and his application was again endorsed by Dr. Evans but was again denied by Dean Stephenson.

The University's Regulations did not authorize the Dean to reject appointment to the rank of Associate Professor. His authority was limited to reviewing the proposal, adding his endorsement or commentary, and forwarding everything through channels, ultimately to the Board of Trustees, which had the exclusive final authority to approve or disapprove the application. The University and Stephenson dispute this interpretation of the Regulations, claiming the procedure was altered by custom and application. But this dispute was resolved by the Court of Appeals in its Opinion on the first appeal of this case. This 1982 Court of Appeals Opinion states in pertinent part:

"The university further contends that as a matter of practice and custom all recommendations for promotion are passed on for higher review only in the event they are approved by the dean of the college. This is not the procedure established by the regulations which have been adopted and custom cannot be allowed to supersede the duly adopted procedures."

Shortly after receiving this second rejection, Hayse met with Stephenson and pointed out to him that under University regulations Stephenson did not have the sole power to reject his application. In response to Hayse's objection, Stephenson

appointed a three-person committee to assist him in reconsidering Hayse's application. This committee also recommended against tenure. Hayse again protested, indicating Stephenson was still not following University regulations. Subsequently, and in response to Hayse's continuing objections, Stephenson forwarded Hayse's file to two different committees, a Vice-President, and ultimately, President Otis Singletary, all of whom sustained the denial of tenure. The application and supporting documents were never forwarded to the Board of Trustees to consider Hayse's applications as the Regulations prescribed.

On May 5, 1978, Hayse was notified of his failure to receive tenure with the explanation that he did not meet the research and publication requirements. Hayse disputed this and contended that his dismissal resulted from the ongoing dispute between Dr. Evans, his direct supervisor, and Stephenson, the Dean of Undergraduate Studies. He also alleged that the University failed to follow its own regulations governing tenure.

On March 27, 1978, Hayse filed an action in Franklin Circuit Court against the Board of Trustees of the University of Kentucky and Dean Stephenson alleging that he was wrongfully denied tenure. He demanded damages and reinstatement at the rank of Associate Professor. In May 1981, Hayse amended his Complaint by adding allegations of constitutional rights violations of the First, Fifth and Fourteenth Amendments to the United States Constitution and Section 2 of the Kentucky Constitution. The Board of Trustees and Stephenson denied the allegations, pled sovereign immunity, and argued both that Hayse's constitutional rights were not violated and that Stephenson acted appropriately in denying tenure.

On May 27, 1981, the Franklin Circuit Court granted Summary Judgment in favor of the Board and Stephenson. The

first appeal, *supra*, followed. The Court of Appeals reversed, holding that the University had failed to follow its own regulations, and, citing *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), remanded the case to the trial court for the purpose of giving Hayse the opportunity to prove "that constitutionally protected conduct was a substantial or motivating factor in the rejection of his promotion *unless the University can then convince the trier of fact that Hayse's promotion would have been denied anyway*, even if there had been no consideration of impermissible facts." [Emphasis added.]

Subsequent to this remand by the Court of Appeals, Hayse filed a second amended complaint adding a claim under 42 U.S.C. § 1983 based on the *same* constitutional rights violations he had previously alleged in the Amended Complaint filed in 1981 before the first appeal. This theory of liability was based on the same facts held to state a cause of action for constitutional violations as per the *Mount Healthy City Board of Education* case, *supra*, on the original appeal.

The case then proceeded to trial on January 29, 1986, with the jury returning a verdict in favor of Hayse awarding him \$61,760 in compensatory damages for loss of earnings, damage to professional reputation, and damages for embarrassment, humiliation and emotional distress. These are the elements of damages in the instructions, and they have not been challenged on this appeal. The trial court then ordered Hayse reinstated at the rank of Associate Professor with tenure.

Following the trial, the Board of Trustees and Stephenson filed a Motion for Judgment Notwithstanding the Verdict, which the trial court sustained, holding that the evidence at trial was insufficient to support the jury's verdict and that there was no evidence upon which reasonable minds could conclude that

impermissible considerations were a motivating factor in the denial of tenure to Hayse. The problem is that this was substantially the *same* evidence which Hayse had represented that he would produce when he prevailed on his first appeal.

The Court of Appeals, rendered its Opinion on this second appeal on December 11, 1987, as modified April 1, 1988. It held, in pertinent part, that the trial court erred in granting Judgment Notwithstanding the Verdict. Further, it held the amended complaint was not, as claimed, in violation of the statute of limitations. But then it reached the same result as the trial court, denying compensation, by deciding the Board of Trustees and Stephenson were protected by sovereign immunity from monetary damages. Finally, the Court of Appeals reversed the trial court's decision that Hayse was not entitled to injunctive relief mandating reinstatement to Associate Professor with tenure, holding that sovereign immunity does not apply to prospective injunctive relief against state officials.

Thus the Court of Appeals agreed with Hayse that the trial court erred in deciding the evidence was insufficient to prove the facts alleged as a cause of action on the first appeal, but nevertheless, on grounds of sovereign immunity, sustained the result denying monetary damages, and then ordered that Hayse be reinstated as an Associate Professor with tenure. For the reasons that follow, we affirm the Court of Appeals on some issues, but we reverse the holding of the Court of Appeals.

I. STATUTE OF LIMITATIONS

The Court of Appeals held that Hayse's federal constitutional claims were not time barred by the statute of limitations. Both sides agreed that the state statute of limitations for personal injuries governs claims under the Federal Constitution and 42 U.S.C. § 1983, *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985); accord *Frisby v. Board of Education of*

Boyle County, Ky.App., 707 S.W.2d 359, 361 (1986). In Kentucky, a claim must be brought within one year after the cause of action accrues. KRS 413.140(1)(a).

The statute of limitations dispute turns on the date upon which Hayse's cause of action accrued. The Board of Trustees and Stephenson argue that the statute began to run in February, 1977, when Hayse received and signed his one-year terminal employment contract. Hayse, on the other hand, contends that the statute did not begin to run until May 5, 1978, the date he was officially notified that his second application for tenure had been rejected.

We agree with the Court of Appeals that neither Hayse's federal constitutional claims nor his claims under 42 U.S.C. § 1983 are time barred, and accordingly affirm. The Board of Trustees and Stephenson admit that the official notice of the rejection of Hayse's second tenure application was not received until May 5, 1978. It was on this date that the University's decision became final and the statute began to run. Since Hayse filed his Complaint within a year of May 5, 1978, the statute of limitations was met. Further, by operation of CR 15.03(1), Hayse's subsequently Amended Complaints averring violations of the United States Constitution and 42 U.S.C. § 1983 relate back to the date of the original complaint because said claims arose out of the same conduct, transaction or occurrence set forth or attempted to be set forth in the original Complaint.

II. SOVEREIGN IMMUNITY AND SUFFICIENCY OF THE EVIDENCE

As previously stated, upon the prior appeal the appellate court determined there was a jury question as to whether Dr. Hayse was denied promotion because of the "internal dispute [that] was raging between the dean of the college and the head of his department," and thus "penalized because of his exercise of [his

constitutional right to] freedom of association." The law of this case upon retrial was:

"According to the rationale of *Mount Healthy City Board of Education, supra*, appellant is entitled to relief if he can show that constitutionally protected conduct (i.e., 'exercise of his freedom of association') was a substantial or motivating factor in the rejection of his promotion unless the University can then convince the trier of fact that appellant's promotion would have been denied anyway even if there had been no consideration of impermissible factors."

This remand with no discussion of the sovereign immunity defense, which had been raised and, which, if appropriate, would call for dismissal, forecloses further litigation of these questions as a matter of law. See *Nashville, C. & St. L. Ry. Co. v. Banks*, 168 Ky. 579, 182 S.W. 660 (1916) and *Eagle Fluorspar Co. v. Larue*, 237 Ky. 263, 35 S.W.2d 303 (1931), recently cited with approval in *Com. Transp. Co. v. Taub*, Ky., 766 S.W.2d 49, 52 (1988). Our rule is that issues which, if sustained, call for dismissal, are taken as decided and rejected when the case has been reversed and remanded on the first appeal.

The question of federal civil rights violations was put in issue by Dr. Hayse's Amended Complaint filed May 18, 1981, alleging that he was "denied due process in violation of Amendments 5 and 14," that "Defendant Stephenson's refusal to follow established procedure because of Plaintiff's association with Dr. Evans violated Plaintiff's First Amendment rights," and that "plaintiff was denied the equal protection to which all other faculty members seeking tenure and promotion are entitled." None of these charges were substantively enlarged when the Second Amended Complaint filed after the appeal specifically referred to 42 U.S.C. § 1983. The defense of sovereign immunity was raised initially, before the first appeal, and the

effect of its rejection by reason of the decision of the first appeal was not lost when the same claim was reasserted in a second amended complaint specifically referring to § 1983.

Upon remand the case was properly submitted to a jury against both the Board of Trustees and Dean Stephenson under instructions stating the law of the case as decided by the Court of Appeals.

The jury then answered Interrogatories based on these instructions to the effect: (1) Dean Stephenson considered constitutionally "impermissible factors . . . in rejecting Dr. Hayse's application(s) for promotion," and (2) the University would *not* have "disapproved Dr. Hayse's application(s) for promotion to the rank of Associate Professor, with tenure," but for consideration of these constitutionally "impermissible factors."

The Court of Appeals, in reversing the Judgment Notwithstanding the Verdict, stated that Dr. Hayse's evidence proving that constitutionally impermissible factors were considered in denying his promotion, albeit circumstantial, "was sufficient to raise a jury question." The evidence was no different from what was represented to the Court of Appeals on the first appeal when it reversed the Summary Judgment and established the law of the case. The question whether these facts represent a violation of Dr. Hayse's constitutionally protected right to freedom of association, while it might otherwise be the subject for legal dispute as an original proposition, has already been decided on the first appeal. It will not now be revisited.

Further, the trial court's Judgment Notwithstanding the Verdict cannot be sustained upon the theory that Dr. Hayse's "promotion would have been denied anyway even if there had been no consideration of impermissible factors." Under *Mt.*

Healthy City Board of Ed., quoted *supra*, the Board of Trustees and Dean Stephenson, not Dr. Hayse, were the parties who had the burden of persuading the jury on this point, and they failed to do so. We cannot properly direct a verdict on the statements of interested parties regarding their version of the facts, even if uncontradicted. This defense was submitted to the jury under instructions which have *not been appealed* and by specific interrogatory, and the jury rejected this defense. The jury's verdict should be sustained.

The doctrine of sovereign immunity has been misapplied as a shield to Dean Stephenson. In the first place, as previously discussed, sovereign immunity as a defense was foreclosed by the first appeal. In the second place, the doctrine of sovereign immunity does not apply to Dean Stephenson under the circumstances in this case in any event. Dean Stephenson was sued for his personal wrongdoing, direct responsibility for violating Hayse's constitutionally protected rights. The fact that this wrongdoing occurred while serving in his official capacity does not entitle him to the defense of sovereign immunity. Our recent decision in *Gould v. O'Bannon*, Ky., 770 S.W.2d 220 (1989), finality June 8, 1989, and our decision of long-standing in *Happy v. Erwin*, Ky., 330 S.W.2d 412 (1959), lay this matter to rest.

The argument to the contrary reflects a glaring misunderstanding of the difference between liability of a state official for personal wrongdoing and nonliability where the claim is premised solely on his representative status, or official capacity. Officials have no vicarious liability for acts of subordinates in which they are not directly involved, i.e., bear no personal responsibility. This has no bearing on liability for one's own personal misconduct in violation of 42 U.S.C. § 1983. 42 U.S.C.A. § 1983, Notes 1246-49, and Supplement, are replete

with cases illustrating this point. Whereas the official capacity of individual members of the U.K. Board of Trustees does not subject them to liability because they bear no direct complicity in this sad affair, Dean Stephenson's status as a public official provides no protection for the misconduct which the jury has directly attributed to Dean Stephenson.

Nor does the "official immunity doctrine," which protects a government official in making decisions involving the exercise of discretion (*See Black's Law Dictionary*, 5th ed. 1979, p. 978), apply to this case. It protects decision making by a public official only *if* his acts are not otherwise wrongful. But official immunity is no defense in present circumstances to claims grounded in constitutionally impermissible misconduct. On the contrary, such misconduct is the gravamen of a civil rights claim:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

There has never been any doubt in this case until now that Dean Stephenson was sued individually, that there were two defendants, Dean Stephenson *and* the Board of Trustees. The Complaint sought recovery against him individually, as well as seeking recovery against the Board of Trustees. The jury instructions, without objection, identified Stephenson as a separate defendant subject to an award of damages against him, personally. He did not enjoy sovereign immunity on grounds that his alleged wrongdoing was performed while serving in his official capacity, nor does the wrongdoing with which he is

charged qualify as discretionary acts covered by the official immunity doctrine.

Since this case was taken under submission, the United States Supreme Court's decision in *Will v. Michigan Dept. of State Police*, ___ U.S. ___, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) has resolved an ongoing controversy as to whether a state or state agency enjoying sovereign immunity under state law can be held liable in a state court action brought under 42 U.S.C. § 1983 for the constitutionally impermissible acts of a subordinate. The *Will* case resolves this conflict, holding that neither a state nor state officials, where the claim "is not a suit against the official but rather is a suit against the official's office" (109 S.Ct. at 2311), are "persons" within the meaning of § 1983, and therefore this civil rights statute does not override the state sovereign immunity of such state agencies and officials, where there is immunity under state law. This decision would apply to the *respondeat superior* liability Board of Trustees if its potential liability had not already been laid to rest by the finality of the decision on prior appeal. It has no application to individual acts of wrongdoing of state officials as the "persons" identified as liable under § 1983.

There is no valid legal reason why the award of damages at the trial of this case should not be affirmed. The trial was conducted in conformity with the law as stated on the first appeal, and the evidence was sufficient to support the verdict.

III. PROSPECTIVE INJUNCTIVE RELIEF

Hayse has also demanded reinstatement as a tenured professor, or what amounts to prospective injunctive relief. As the Court of Appeals correctly points out, 231 of the Kentucky Constitution does not differentiate between suits for monetary damages and suits for injunctive relief. Many states though, have made such distinctions. See, e.g., *Beck v. Kansas Adult*

Authority, 241 Kan. 13, 735 P.2d 222, 226 (1987) and *Bagg v. University of Texas Medical Branch of Galveston*, 726 S.W.2d 582, 584 (Tex.App.1987). The reasoning for this distinction stems from the landmark United States Supreme Court decision in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

The effect of the *Ex Parte Young* doctrine is to bring within the scope of judicial review alleged unconstitutional actions of state officials which might otherwise escape such review and to subject state governments and their instrumentalities to certain restrictions of the United States Constitution that they might otherwise be able to ignore. The Kentucky Constitution § 231 cannot be used as "a bar to litigants seeking prospective injunctive relief for violations of federally protected rights against state officials." *Id.* Hayse is entitled to further pursue his claim for reinstatement because he was initially denied administrative due process.

Nevertheless, under our decision in *Brown v. Jefferson County Police Merit Bd.*, Ky., 751 S.W.2d 23, 27 (1988)

"To correct the procedural error of the administrative body, the appropriate relief is to remand the case to the administrative agency to decide the merits of the controversy."

Thus, Dr. Hayse is not entitled to reinstatement. He is only entitled to have his application for tenure considered *ab initio* by the Board of Trustees under the rules and regulations pertaining thereto at the time tenure was denied him.

The trial court's Judgment Notwithstanding the Verdict is vacated, and the verdict and judgment thereon for damages reinstated. The separate judgment of the trial court denying injunctive relief against the Board of Trustees is also vacated, but *not* as the Court of Appeals ordered, to "order the

reinstatement of [Dr. Hayse] to the position he had been denied--that of associate professor with tenure." Instead, in compliance with *Brown v. Jefferson County Police Merit Bd.*, *supra*, the trial court shall enjoin the University of Kentucky Board of Trustees to consider Dr. Hayse's application as stated above, under the rules and regulations pertaining thereto at the time tenure was denied him.

COMBS, LAMBERT and VANCE, JJ., concur.

ANGGELIS, Special Justice, dissents by separate opinion in which GANT and WINTERSHEIMER, JJ., join.

ANGGELIS, Special Justice, dissenting.

For the reasons set forth below, I respectfully dissent.

I. "LAW OF THE CASE" AND SOVEREIGN IMMUNITY

The majority makes a serious error when it holds that the "law of the case" as established by the Court of Appeals forecloses the sovereign immunity defense in subsequent appeals of the case *sub judice*. Such a holding ignores the breadth and importance of the sovereign immunity defense for agencies and officials of the Commonwealth.

The majority opinion cites *no* case in which the sovereign immunity defense has been foreclosed by application of the "law of the case". We should not now establish this dangerous precedent. Although the majority alleges that Dean Stephenson was sued in his individual and not official capacity, it does *not* dispute the fact that the Board of Trustees is an entity that would otherwise be entitled to the sovereign immunity defense but for the "law of the case" rule.

We have always held that the sovereign immunity defense is a constitutional protection that can be waived *only* by the General Assembly and *applies regardless of whether the defense was pled in an answer or even relied upon.* *Wells v. Com., Dept.*

of Highways, Ky., 384 S.W.2d 308 (1964). (Emphasis Supplied). Thus, until today sovereign immunity could not be waived by an application of the "law of the case" or by failure to plead such affirmative defense or by the failure to properly preserve it for appellate review to this Court.

In point of fact, sovereign immunity cannot be waived through the negligence, intentional act or stipulation of an employee, an agency, or a department of the Commonwealth of Kentucky nor any attorney representing any of these enumerated individuals or entities.

In the case at Bar, the majority has created a *judicial* exception to Section 231 of the Kentucky Constitution wherein the "law of the case" can be used to create a waiver of sovereign immunity. This is the province of the General Assembly, it is not for the judiciary to erode this historical protection. Our Constitution does not provide for this unnecessary judicial intrusion. Under the authority of *Union Light, Heat & Power Company v. Blackwell's Adm'r.*, Ky., 291 S.W.2d 539 (1956), this Court should not allow the *clearly erroneous* decision of the Court of Appeals to establish a waiver of sovereign immunity.

II. OFFICIAL CAPACITY OF DEAN STEPHENSON

The majority opinion contends that Dean Stephenson was sued in his individual capacity in spite of overwhelming evidence to the contrary. No where in any of the pleadings of this lengthy litigation is there ever any reference to John B. Stephenson being sued as an individual or that he was sued in any other than his official capacity as Dean when he denied Hayse tenure. The initial complaint, as well as the subsequently amended complaints, sought recovery against "Dean" Stephenson and the Board of Trustees, both public entities deserving of sovereign immunity protection.

The jury instructions did not identify John B. Stephenson as

an individual defendant rather, they referred to him as "Dean" Stephenson. Also, and contrary to the position of the majority, the jury instructions provided that Dr. Hayse could only be awarded compensatory relief if the jury found against both Dean Stephenson *and* the Board of Trustees. Clearly, this was an improper instruction. There was an instruction tendered to the jury which would have allowed the jury to give punitive damages against Dean Stephenson if it found that Dean Stephenson acted willfully, deliberately, maliciously, or with reckless disregard of Dr. Hayse's constitutional rights, however, the jury found that such punitive relief should not be awarded.

Accordingly, I would affirm that portion of the Court of Appeals' Opinion which held that there is "nothing in the record to lead us to believe that Stephenson was sued in his individual capacity. Thus, he would be protected by the same sovereign immunity as the Board, and has no liability for monetary damages."

III. SUFFICIENCY OF THE EVIDENCE

The trial court, was correct when it issued a judgment notwithstanding the verdict because the evidence was compelling that Dr. Hayse's promotion would have been denied anyway even if there had been no consideration of impermissible factors. It was undisputed that Dr. Hayse's application for tenure was treated in exactly the same way as every other similarly situated professor.

The majority is correct when it asserts that the Board of Trustees and Dean Stephenson had the burden of persuading a jury that Dr. Hayse's promotion would have been denied anyway. Although the jury apparently believed that the Board of Trustees and Dean Stephenson did not meet this burden, the trial judge, clearly did. Where the record shows, as it does here, that only one fair and reasonable conclusion can be drawn from

the evidence, the case should not be submitted to the jury. *Crest Coal Company, Inc. v. Bailey*, Ky., 602 S.W.2d 425 (1980).

Indeed, it was manifestly clear that Hayse would have been denied tenure. As found by the trial court, at the time Hayse applied with the University of Kentucky he stated that he expected to complete his Ph.D. in 1972, but he did not complete it until four years later. Between 1972 and 1976, Hayse was repeatedly warned and counseled about his slowness in completing the Ph.D. requirements. Additionally, Dean Stephenson and Dr. Robert O. Evans, Hayse's boss, on several occasions, expressed concern to Hayse over his failure to produce scholarly work or get anything published. This is evidenced by the fact that between August 1971 and June 1978, Hayse published no scholarly works.

The Board of Trustees and Dean Stephenson presented numerous witnesses during the six day trial of this action which provided the basis for the trial court's findings of fact when it issued its judgment notwithstanding the verdict. Even if there was a procedural defect in the University's handling of Hayse's promotion, the outcome would have been the same if no procedural defect had existed. Hayse was not discriminated against under any standard and his federally protected rights were not violated.

GANT and WINTERSHEIMER, JJ., join in this dissent.

OPINION RENDERED: December 11, 1987; 10:00 a.m.

TO BE PUBLISHED

AS MODIFIED: April 1, 1988; 10:00 a.m.

TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 86-CA-1826-MR

DR. JOSEPH MURRAY HAYSE **APPELLANT**

V. APPEAL FROM FRANKLIN CIRCUIT COURT

HONORABLE RAY CORNS, JUDGE

ACTION NO. 79-CI-0437

BOARD OF TRUSTEES OF THE

UNIVERSITY OF KENTUCKY and

DEAN JOHN B. STEPHENSON APPELLEES

and NO. 86-CA-1902-MR

BOARD OF TRUSTEES OF THE

UNIVERSITY OF KENTUCKY and

DEAN JOHN B. STEPHENSON CROSS-APPELLANTS

CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT

V. HONORABLE RAY CORNS, JUDGE

ACTION NO. 79-CI-0437

DR. JOSEPH MURRAY HAYSE CROSS-APPELLEE

REVERSING ON DIRECT APPEAL.

AFFIRMING IN PART, REVERSING

IN PART ON CROSS-APPEAL

* * * * *

BEFORE: CLAYTON, GUDGEL and REYNOLDS, Judges.
REYNOLDS, JUDGE. Dr. Joseph Murray Hayse, a former
instructor in the honors program at the University of Kentucky

(UK), appeals from a judgment of Franklin Circuit Court. Following a jury verdict in appellant's favor on the issues of whether his constitutional, federal civil rights, and contractual rights had been violated by a denial of tenure, the circuit court (1) dismissed all claims against appellee Dean John B. Stephenson because of improper venue, (2) dismissed all federal civil rights (42 U.S.C. 1983) and constitutional claims as being time barred, and (3) granted appellees' (UK's) motion for a judgment notwithstanding the verdict (JNOV), CR 50.02, on appellant's remaining claims. Hayse appeals from these decisions. In a cross-appeal, appellees contend that the trial court erred in not holding that they were protected by the doctrine of sovereign immunity. We conclude that both sides' arguments have merit, and reverse accordingly.

This action contains a long procedural history. In 1971, appellant, who was then studying to obtain a Ph.D. in comparative literature from the University of Wisconsin, was hired as an instructor for the honors program at UK. At all times relevant to this action, Dr. Robert O. Evans was director of this program at UK. After obtaining his Ph.D. in 1975, appellant was promoted to the position of assistant professor. During the 1976-77 academic year, appellant was first considered for tenure.

UK follows a policy known as "seven years up or out." Basically, this means that unless instructors are granted tenure, they will not be rehired after their seventh year of teaching. Appellant's first attempt at obtaining tenure was unsuccessful. The honors program had recommended that appellant be granted tenure and, pursuant to university regulations, had forwarded this recommendation to Stephenson, then Dean of Undergraduate Studies at UK. Stephenson rejected appellant's application. Appellant was offered, and accepted, a terminal

contract. This contract meant that the 1977-78 academic year would be appellant's last year at UK, unless tenure was subsequently granted. There was nothing in this contract, however, to prohibit appellant from making another attempt to obtain tenure.

Appellant made a second attempt during this final year. Once again, his application was supported by the honors program, but rejected by the dean. However, after speaking to both appellant and Dr. Evans about the regulations in effect at this time, Stephenson agreed to forward appellant's application to the appropriate university vice president, where it could be reviewed by an area committee. Appellant contends that this procedure was required, and that the dean lacked the authority to reject his application.

The vice president and area committee also recommended against tenure. At trial, however, questions were raised concerning the amount of review done by the committee. Appellant's application was never forwarded to the university president or the board of trustees (board) or ruled upon by them as required by its own regulations pertaining to tenure policy. On May 5, 1978, appellant was notified of his failure to receive tenure. The explanation given was insufficient research, as evidenced by a lack of publication. Appellant disputes this and contends that his dismissal resulted from a continuing series of disputes between Evans, his direct supervisor, and the dean.

On March 27, 1979, appellant commenced this action in Franklin Circuit Court by filing a complaint alleging that his contractual rights were violated by UK's failure to follow their own regulations pertaining to tenure. He requested damages and reinstatement at the rank of associate professor. Appellees responded, on April 19, 1979, with a motion to dismiss, alleging that appellant failed to state a claim against Stephenson and

alleging that the board was protected by sovereign immunity. This motion was overruled. On May 16, 1979, appellees filed their answer, raising for the first time the claim of improper venue for Stephenson. Appellant subsequently amended his complaint, alleging that his rights under the First, Fifth, and Fourteenth Amendments of the United States Constitution had been violated. Appellees responded and moved for a summary judgment.

On May 27, 1981, the Franklin Circuit Court granted summary judgment, holding that there were no genuine issues of material fact. An appeal was taken and, in an unpublished opinion rendered on February 26, 1982, this Court reversed, holding that the university had failed to follow its own regulations. Under the authority of Mt. Healthy City Board of Educations v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), the case was remanded to give appellant the opportunity to show "that constitutionally protected conduct was a substantial or motivating factor in the rejection of his promotion unless the university can then convince the trier of fact that appellant's promotion would have been denied anyway even if there had been no consideration of impermissible facts." Hayse v. Board of Trustees of the University of Kentucky and Dean John B. Stephenson, Ky. App., No. 81-CA-1604-MR (rendered February 26, 1982). Subsequent to this decision, appellant filed a second amended complaint alleging that his rights under 42 U.S.C. 1983 had been violated. In their answer, appellees first raised the argument that all of appellant's federal claims were barred by the statute of limitations.

The trial court subsequently assigned the case for jury trial on January 29, 1986. On January 23, 1986, appellees filed the following four motions: (1) To dismiss Stephenson because of qualified immunity; (2) to dismiss all federal claims because of

the statute of limitations; (3) to dismiss all claims against the board because of a lack of subject matter jurisdiction due to sovereign immunity; and (4) to rescind the order granting a jury trial. Appellant objected, citing the closeness of the trial date, and the circuit court allowed the trial to proceed on the scheduled date while allowing appellant the opportunity to respond to the motions following the trial's conclusion. The jury returned a verdict in favor of appellant, awarding him \$61,760 in damages (\$50,134.24 as lost earnings, \$5,812.88 for damage to professional reputation, and \$5,812.88 for embarrassment, humiliation, and emotional distress). The court subsequently ordered reinstatement at the rank of associate professor with tenure.

Appellees filed motions to alter or amend the verdict, CR 59, or to be granted JNOV, CR 50.02. The trial court, after considering all the pretrial and post-trial motions, and the responses thereto, held that appellees were not entitled to either sovereign immunity or qualified immunity. The trial court, however, accepted appellees' other arguments and dismissed all of appellant's claims, holding that (1) the court lacked venue over Stephenson, (2) the constitutional and federal civil rights claims were barred by the statute of limitations, (3) reinstatement was not proper because evidence showed that appellant was no longer qualified to be a professor, and (4) that JNOV was proper because the evidence was insufficient to support the verdict and the evidence also showed that appellant would not have been granted tenure even in the absence of any impermissible factors. Thus, appellant took nothing, and appeals. Appellees cross-appealed on the immunity issues.

Appellant's first allegation is that the circuit court erred in not holding that the defense of improper venue over Stephenson was waived by appellees. We agree. Kentucky requires that

certain specific defenses, including improper venue, be raised in the initial defensive pleading. CR 12.07 and 12.08. Appellees responded to the initial complaint with a motion to dismiss for two reasons - - failure to state a claim upon which relief could be granted, CR 12.02, and sovereign immunity. As this pleading did not include any allegation of improper venue, that defense was waived. We observe that the issue of waiver was not addressed by appellees in their brief.

The circuit court also held that appellant's federal claims were time-barred by the applicable statute of limitations. Both sides agree that a state's statute of limitations for personal injuries governs claims under the federal constitution and 42 U.S.C. 1983. Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985); accord Frisby v. Board of Education of Boyle County, Ky.App., 707 S.W.2d 359, 361 (1986). In Kentucky, a claim must be brought within one year after the cause of action accrues. KRS 413.140(1)(a). In this situation, we conclude that appellant brought his claim within the allowable time period. Additionally, even if we were to accept appellees' arguments on when the action occurred, the statute of limitations defense had been waived.

The statute of limitations dispute is caused by disagreements as to the date upon which appellant's cause of action accrued. Appellees argue that the statute began to run in 1977 when appellant received, and signed, his terminal employment contract. Appellant, on the other hand, contends that the statute did not begin to run until May 5, 1978, the date he was officially notified that his second application for tenure had been rejected. We agree with appellant's conclusion.

Appellees direct us to Delaware State College v. Ricks, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), and we determine that this case is controlling. In Ricks, after a detailed

analysis of procedures at that school, the United States Supreme Court concluded that it was not error for the District Court to have held that the statute of limitations began to run at the issuance of the terminal contract. Id., 449 U.S. at 257-62. The factual differences, however, between the situation sub judice and Ricks lead us to interpret Ricks as supporting appellant's position. In Ricks, the application for tenure was officially rejected by the board of trustees before the terminal contract was offered. The Supreme Court concluded that once the board had made its official decision, termination was inevitable. Id.

In our situation, the evidence shows that, while appellant's initial application for tenure was rejected by the dean and he was offered a terminal contract, this would not prevent appellant from making another attempt to obtain tenure in his final year. Unlike Ricks, the terminal contract did not represent a final, official decision by the board. Additionally, in the pleadings, appellees admit that the official notice of the rejection of appellant's second tenure applications was not received until May 5, 1978. We conclude that it was on this date that the university's decision became final, and the statute began to run. As an aside, appellees even appeared to support this position in the following question, at trial, during the cross-examination of appellant: "But after, on May 5th or thereabouts of 1978, when you knew that your employment with the university was going to be up, why didn't you ask to resign then? (Emphasis added)." Since appellant filed his complaint within a year of May 5, 1978, the statute of limitations was met.

Appellees' statute of limitations defense would also fail because of the proposition known as "law of the case." This rule states that the opinion upon the first appeal is controlling not only to errors relied upon in that appeal, but also for issues which could have been raised at the first appeal but were not.

Cincinnati, N. O. & T. P. Ry. Co. v. Perkins Adm'r, 193 Ky. 207, 235 S.W. 776, 777 (1921). Although appellant had not added his claim under 42 U.S.C. 1983 prior to the first appeal, his constitutional claims were considered by this Court. The record of the first appeal reveals that a statute of limitations argument was never raised pursuant to these. Therefore, under law of the case, we would deem this defense as waived.

Appellant's remaining allegations concern the circuit court's rejection of the jury verdict in favor of a JNOV. CR 50.02. The trial court found, in part, that appellant was no longer qualified to be a teacher and the evidence was insufficient to support the jury's verdict. We disagree. The test to be used in deciding a motion for a JNOV is the same as for a motion for a directed verdict; whether there was sufficient evidence to raise an issue of fact for submission to the jury. Cassinelli v. Begley, 433 S.W.2d 651, 652 (1968). The court must consider the evidence in the strongest possible light in favor of the person opposing the motion. Taylor v. Kennedy, Ky. App., 700 S.W.2d 415, 416 (1985).

In the situation sub judice, we have discovered no specific testimony concerning appellant's current teaching qualifications. Even though appellees allege that his previous research was lacking, this would not necessarily translate into a condemnation of appellant's current ability. There also was, however, testimony which could support the jury's determination.

The jury heard evidence from Dr. Evans and a former secretary concerning friction between the honors program and the office of the dean of undergraduate studies. Additionally, another honors program professor testified that there was a perception by the dean that all the faculty hired by Dr. Evans, including appellant, were unqualified. Appellees point out that other university professors and administrators considered

appellant unqualified, but that was countered by evidence alleging that these individuals only had an opportunity to make a perfunctory examination of appellant's record.

In considering a motion for a directed verdict of a JNOV, "the court must draw all fair and rational inferences from the evidence in favor of the . . . [party opposing the motion]

. . . , and the evidence of such party's witnesses must be accepted as true for the purposes of such a motion." Cassinelli v. Begley, Ky., 433 S.W.2d at 655. Admittedly, the evidence supporting appellant was somewhat sketchy and largely circumstantial. In this situation, however, we conclude that it was sufficient to raise a jury question.

Appellees also contend that, even if the jury verdict were accepted, reinstatement was inappropriate. In the case relied upon by this Court in our initial consideration of this matter, reinstatement was held to be an appropriate remedy. Mt. Healthy City School District v. Doyle, 429 U.S. at 283. Appellees direct us to the two cases which have criticized Doyle and held that reinstatement was not appropriate. We note, however, that one case relied upon by appellees, Ayers v. Western Line Consolidated School District, 555 F.2d 1309 (5th Cir., 1977), was subsequently vacated. See Givhan v. Western Line Consolidated School District, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1978). Upon remand, reinstatement was held to be a proper remedy. Ayers v. Western Line Consolidated School District, 691 F.2d 766 (5th Cir. 1982). In this situation, we find nothing improper in reinstating appellant.

While the above considerations would ordinarily lead this Court to remand this case for reinstatement of the jury verdict, we have also examined appellees' arguments concerning immunity, and we conclude that several have merit. Thus,

appellant will be precluded from recovering all that he has asked.

Appellees contend that the board and Stephenson are entitled to sovereign immunity under Section 231 of the Kentucky Constitution. They also argue, in the alternative, that even if Stephenson were not entitled to sovereign immunity, he would be entitled to qualified immunity. The trial court found no immunity and appellant, relying on a footnote in Martinez v. California, 444 U.S. 227, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980), reh. denied, 445 U.S. 962 (1980), argues that this was a correct determination.

It is clear that Kentucky courts can hear actions based on 42 U.S.C. 1983. See Sowers v. Atkins, Ky., 646 S.W.2d 344, 347 (1983). The question before us is whether the board and the dean can claim immunity from such suit. Appellant contends that "[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. §1983 or §1985(3) cannot be immunized by state law." Martinez v. California, 100 S.Ct. at 588, n. 8. Martinez was an action originally brought in state court, concerning the liability of a parole board. In a suit originally brought in federal court, however, the United States Supreme Court has held that 42 U.S.C. 1983 "was not intended to overturn the constitutionally guaranteed immunity of the several States." Quern v. Jordan, 440 U.S. 332, 342, 99 S.Ct. 1139, 1146, 39 L.Ed.2d 358 (1979). Several states have relied on Quern to hold that sovereign immunity is available in situations similar to the case at bar, even in light of Martinez. See, e.g., Makanui v. Department of Education, 721 P.2d 165 (Hawaii Ct. App. 1986), and Fetterman v. University of Connecticut, 192 Conn. 539, 473 A.2d 1176 (1984). We have found no Kentucky cases dealing with this exact situation.

The courts of the Commonwealth, however, have not hesitated to find the boards of trustees of state universities protected from suits for monetary damages in other situations, unless sovereign immunity had been specifically waived by the general assembly. See Dunlap v. University of Kentucky Student Health Services Clinic, Ky., 716 S.W.2d 219 (1986), and Rooks v. University of Louisville, Ky. App., 574 S.W.2d 923 (1978). We have found nothing to show any legislative intent to waive sovereign immunity in civil rights actions and, notwithstanding the footnote in Martinez, we therefore hold that the board is protected from monetary damages.

In the situation sub judice, in addition to monetary damages, appellant has also requested reinstatement. Even though Section 231 of the Kentucky Constitution does not differentiate between suits for monetary damages and suits for injunctive relief, many states have made such distinctions. See, e.g., Beck v. Kansas Adult Authority, 241 Kan. 13, 735 P.2d 222, 226 (1987), and Bagg v. The University of Texas Medical Branch of Galveston, 726 S.W.2d 582, 584 (Tex. App. 1987). The same distinction has also been made in cases concerning the immunity granted the states by the Eleventh Amendment to the United States Constitution. See, e.g., Kashani v. Purdue University, 813 F.2d 843, 848 (7th Cir. 1987), cert. denied, 108 S.Ct. 141 (1987), and Lee v. Western Reserve Psychiatric Habilitation Center, 747 F.2d 1062, 1066 (6th Cir. 1984). The reason cited for this distinction is the belief that immunity statutes have been enacted as protection for the state treasury. Constitution of Kentucky §231 was enacted for the same purpose. Therefore, the board of trustees would be shielded from liability for the \$61,670 in monetary damages awarded by the jury. No such shield exists, however, for the injunctive relief of reinstatement.

The question of the dean's liability creates a different question. His immunity, if any, would be contingent on whether he was sued in an official or a personal capacity.

When it comes to defenses to liability, an official in a personal capacity action may, depending on his position, be able to assert personal immunity defenses such as objective reasonable reliance on existing law The only immunities that can be claimed in an official-capacity are the forms of sovereign immunity that the entity, qua entity, may possess

Kentucky v. Graham, 473 U.S. 159, 166-67, 105 S.Ct. 3099, 3106, 87 L.Ed.2d 114 (1985). In other words, if sued in his individual capacity, the dean could only assert a qualified, "good faith," immunity. Timmy S. v. Stumbo, 537 F.Supp. 39, 46 (E.D.Ky. 1981).

There is nothing in appellant's complaint that specifically alleges any personal liability on the part of Stephenson. All the evidence at trial showed that, while the dean was not following the procedures mandated by the university regulations, his conduct had the approval of his superiors. "Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under the cover of state law. Official capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" (Cites omitted). Kentucky v. Graham, 105 S.Ct. at 3105. Herein all of appellant's relief, both monetary and injunctive, would be placed on the university. We find nothing in the record to lead us to believe that Stephenson was sued in his individual capacity. Thus, he would be protected by the same sovereign immunity as the board, and has no liability for monetary damages.

Concluding that the dean is protected by sovereign immunity, it is not necessary to address the issue of qualified immunity.

For the foregoing reasons, this Court has reached the same result as the circuit court, albeit for different reasons, except as it pertains to appellant's reinstatement. The judgment of the Franklin Circuit Court is reversed on direct appeal and reversed in part on the cross-appeal where sovereign immunity had been denied for monetary damages. This case is remanded to the circuit court with directions that it order the reinstatement of appellant to the position he had been denied -that of associate professor with tenure.

ALL CONCUR.

ATTORNEY FOR APPELLANT/CROSS-APPELLEE:

William C. Jacobs
173 North Limestone Street
Lexington, Kentucky 40507

ATTORNEYS FOR APPELLEE/CROSS-APPELLANT:

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31a

FILED
JUL 3 1986
EUNICE MOORE
CLERK FRANKLIN CIRCUIT COURT
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO.
79-CI-0437

DR. JOSEPH MURRAY HAYSE PLAINTIFF

FINDINGS OF FACT,

VS. CONCLUSIONS OF LAW,

AND JUDGMENT

BOARD OF TRUSTEES OF THE DEFENDANTS
UNIVERSITY OF KENTUCKY and
DEAN JOHN B. STEPHENSON

** ** *

The parties to this litigation are Dr. Joseph Murray Hayse (Hayse), the Board of Trustees of the University of Kentucky (Board), and Dean John B. Stephenson (Stephenson).

The chronological history of this case may be summarized as follows:

March, 1979, - Hayse filed suit invoking the Court's jurisdiction pursuant to KRS 42A.245, basing his claim solely on Breach of Contract.

March, 1981, - Hayse moved for Summary Judgment.

April, 1981, - The Board and Stephenson filed Cross-Motions for Summary Judgment.

May, 1981, - Hayse filed his First Amended Complaint alleging constitutional violations of the First (1st), Fifth (5th), and Fourteenth (14th) Amendments to the United States Constitution and Section 2 of the Kentucky Constitution.

May, 1981, - The Court sustained the Board and Stephensons' Cross-Motions for Summary Judgment.

January, 1982, - The Court of Appeals reviewed this Court's ruling and remanded the case for further proceedings.

March, 1985, - Hayse filed a Second Amended Complaint to include a claim based on 42 U.S.C. Section 1983.

Summer, 1985, - The Board and Stephenson filed various Motions to Dismiss.

January, 1986, - The Board and Stephenson renewed their Motions to Dismiss on the basis that the statute of limitations had run, the Board was shielded by the cloak of sovereign immunity, Stephenson was protected by qualified immunity, and this Court was not the proper venue; to rescind the Order granting a jury trial; and to sever Stephenson's trial from that of the Board. The Court reserved ruling on these motions until after the impending jury trial of Hayse's constitutional and federal statutory claims, the Court having reserved for a bench trial Hayse's contract claims.

February, 1986, - After eight (8) days of trial, the jury returned a verdict for Hayse in the amount of \$61,760 in compensatory damages.

March, 1986, - The Court, in considering the Board and Stephensons' Pretrial Motions, dismissed all of Hayse's constitutional and federal statutory claims on the basis that they were barred by the statute of limitations; dismissed Stephenson because of lack of venue; and at the request of counsel for Hayse, entered Judgment to reflect the jury verdict reinstating Hayse and awarding him \$61,760; advising that the Court would

entertain with favor the Board and Stephensons' Motion(s) to Alter, Amend, or Vacate those Judgments, and for Judgment Notwithstanding the Verdict; or in the alternative, for a New Trial.

Having reviewed the evidence, including the avowals, exhibits, record, and citations of authority, the Court makes the following:

FINDINGS OF FACT

(1) Hayse was employed as an Instructor in the University of Kentucky's Honors Program from August, 1971, through June, 1976, and as an Assistant Professor in that program from August, 1976, through June 1978.

(2) Hayse's employment consisted of a series of seven (7) one-year contracts. Stephenson was not a party to any of those contracts.

(3) At the time of his initial employment, Hayse stated that he expected to receive his Ph.D. in 1972. He did not do so. There were numerous discussions over his lack of progress in completing his Ph.D. He was aware that his superiors were displeased with his slowness in completing his Ph.D. requirements.

(4) In 1976, Hayse received a Ph.D. in Comparative Literature from the University of Wisconsin.

(5) On several occasions, both Stephenson and Dr. Robert O. Evans, who was head of the Honors Program, expressed concern to Hayse over his failure to produce scholarly work or get anything published.

(6) Between August, 1971, and June, 1978, Hayse published no scholarly works.

(7) Hayse's superiors consistently rated his teaching as satisfactory from 1971 through 1978.

(8) The usual practice of the University of Kentucky is to retain non-tenured faculty members for a probationary period not to exceed seven (7) years. By the end of the sixth (6th) year, at the latest, the University reviews the non-tenured faculty member for possible promotion and tenure. If the faculty member under consideration is not to receive tenure, he or she is so informed and is offered a one-year terminal reappointment as a grace period during which to look for another job.

(9) The manner of review for non-tenured faculty members is prescribed in the University's academic regulations. The University's method of review during the entire time Hayse taught there was that the appropriate Department Chairman assembled a file for the non-tenured faculty member, including a vita and a list of publications and recommendations from tenured faculty members, and forwarded the file, along with the Department Chairman's own recommendation, to the Dean of the appropriate College within the University. The Dean then reviewed the recommendation and approved or disapproved it. If the Dean disapproved the recommendation, the non-tenured faculty member would be notified that he or she would not be granted tenure, but would receive a one-year terminal reappointment.

(10) The Department Chairman to whom Hayse reported was Dr. Robert O. Evans. The Dean to who Dr. Evans reported was Stephenson.

(11) In the spring of 1977, Dr. Evans submitted Hayse's file to Stephenson, recommending that Hayse be granted tenure. Stephenson disapproved the recommendation and informed Hayse in the spring of 1977 that he would not be granted tenure and that Hayse was to receive a one-year terminal appointment.

(12) Vice-President Lewis Cochran, to whom Stephenson reported, had delegated responsibility for terminal appointments and ultimate action thereon to Stephenson.

(13) The action of Stephenson in disapproving Hayse for tenure in the spring of 1977 was within his authority and in accord with the Governing Regulations of the University, which provide that the Dean shall be responsible for terminal appointments or for ultimate action thereon when such authority has been delegated to the Dean by the Vice-President to whom he reports or by the President.

(14) The University's Governing Regulations control and take precedence over the University's Administrative Regulations.

(15) When Hayse was reconsidered for tenure near the close of the 1977-78 academic year, Stephenson, a special ad hoc committee, the Graduate Dean, and an Area Committee composed of persons outside Hayse's Department all considered Hayse's credentials and qualifications. The Area Committee, which is a Standing Committee appointed by the President of the University, was in this case chaired by Dr. Thomas, who had been Chairman of the Department of Comparative Literature at the University of Arkansas for ten (10) years. Dr. Thomas testified that Hayse lacked scholarly potential and should not be granted tenure.

(16) Hayse taught during the 1977-78 academic year under a one-year non-renewable contract. In the spring of 1978, Stephenson informed Hayse that he would not be teaching at the University the following year.

(17) At the time of the University's allegedly improper actions, Hayse was a non-tenured Assistant Professor with a one-year terminal teaching appointment.

(18.) A philosophical conflict existed between Stephenson and Dr. Evans during the time that Hayse taught at the University. This conflict stemmed from Dr. Evans and Stephensons' differing views of the nature of the Honors Program. Hayse refrained from becoming involved in that conflict.

(19) Under the University's standards at the time Hayse was considered for tenure, he would not have been granted tenure under any circumstances because of his obvious deficiencies as a scholar. There is absolutely no evidence to the contrary in the record of this case. In fact, the depth of the research presented by Hayse as his scholarly work is destroyed by its length of 910 pages.

(20) Hayse is not presently qualified to teach at the University level. He has failed to maintain his abilities, and has yet to achieve publication of scholarly work in his field.

(21) There was no evidence that Hayse would have been retained, promoted, or given tenure but for his association with his Department Chairman, Dr. Evans, or that his association with Dr. Evans was a factor in the decision not to grant Hayse tenure.

(22) The evidence is undisputed that Hayse's case was considered in exactly the same manner as all other tenure and promotion cases at the University. Even if there had been a procedural defect in the University's handling of Hayse's case, the outcome would have been the same if no procedural defect had existed.

(23) Hayse was fully compensated for his services under each of his contracts with the University.

CONCLUSIONS OF LAW

(1) The Court concludes that under the holdings of Wilson and Virgil v. Garcia, 471 U.S. ___, 85 L. Ed. 2d 254 (1985) and

Delaware State College v. Ricks, 449 U.S. 250 (1980), Hayse's constitutional and federal statutory claims are barred by the applicable statute of limitations, KRS 413.140(1)(a). Hayse's cause of action accrued in the spring of 1977, when he was informed that he would not receive tenure and was given a one-year terminal reappointment. He did not file suit until March, 1979. Wilson and Virgil v. Garcia, *supra*, is clearly retroactive. Mulligan v. Hazard, 777 F.2d 340 (6th Cir. 1985).

(2) Hayse's due process rights were not infringed by any actions of either the Board or Stephenson. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972); Garrett v. Matthews, 625 F.2d. 658 (5th Cir. 1980); Press v. Board of Regents, 489 F. Supp. 150 (M.D. Ga. 1980).

(3) Hayse's First (1st) Amendment Rights were not infringed. Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977); Lieberman v. Gant, 474 F. Supp. 848 (D. Comm. 1979).

(4) Hayse was not denied equal protection under the Fourteenth (14th) Amendment to the United States Constitution or under Section 2 of the Kentucky Constitution.

(5) Hayse is not entitled to reinstatement. Lee v. Walker County School Systems, 594 F.2d 156 (5th Cir. 1979).

(6) Hayse is not entitled to an award of damages on his constitutional or federal statutory claims, nor is he entitled to an award of costs or attorney's fees.

(7) The Board and Stephenson are not entitled to either sovereign immunity or qualified immunity.

(8) Venue over Stephenson does not properly arise in Franklin County.

JUDGMENT

For the foregoing reason, the Court **ORDERS AND ADJUDGES** that Hayse's constitutional and federal statutory

claims shall be, and they are, **DISMISSED WITH PREJUDICE**, and that Hayse is entitled to **NEITHER REINSTATEMENT, MONETARY DAMAGES, COSTS, OR ATTORNEY'S FEES.**

This is a final Order, and there is no just cause for delay.

This 2nd day of July, 1986.

/s/ Ray Corns

RAY CORNS, JUDGE

FRANKLIN CIRCUIT COURT

DIVISION I

FILED
JUL 3 1986
EUNICE MOORE
CLERK FRANKLIN CIRCUIT COURT
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO.
79-CI-0437

DR. JOSEPH MURRAY HAYSE PLAINTIFF
VS. ORDER
BOARD OF TRUSTEES OF THE DEFENDANTS
UNIVERSITY OF KENTUCKY and
DEAN JOHN B. STEPHENSON

** ** ** ** ** **

On April 7, 1986, the Court heard argument on the following pending motions:

- (1) The Board and Stephensons' Motion to Alter, Amend, or Vacate the Judgment filed herein on March 28, 1986;
- (2) The Board and Stephensons' Motion for Judgment Notwithstanding the Verdict and for a New Trial filed herein on March 28, 1986;
- (3) Hayse's Motion to Modify and Correct Order filed herein on April 7, 1986, and;
- (4) Hayse's Motion to Vacate Portions of Order of Dismissal and for entry of a new one filed herein on April 7, 1986.

The Court having heard oral argument, reviewed the memoranda of counsel, and being sufficiently advised, **ORDERS AND ADJUDGES** as follows:

- (1) Hayse's Motion to Modify and Correct Order, as well as his Motion to Vacate Portions of Order of Dismissal and for

entry of a new one shall be and they are, **OVERRULED**. The Court's Order of Dismissal entered herein on March 24, 1986, dismissing all claims against the Defendant Stephenson on the basis of lack of venue, and dismissing the Plaintiff's constitutional and federal statutory claims for lack of subject matter jurisdiction as a result of the expiration of the applicable statute of limitations is **REAFFIRMED** and stands as the final order of this Court on the matter;

(2) The Board and Stephensons' Motion to Alter, Amend, or Vacate the Judgment shall be, and it is, **SUSTAINED**. The Trial, Verdict, and Final Judgment and the Final Judgment ReInstating Plaintiff, both of which were filed herein on March 19, 1986, shall be, and they are, **VACATED IN THEIR ENTIRETY** on the following grounds:

(a) By oral Order on March 19, 1986, all claims against Stephenson were dismissed pursuant to his pretrial motions on the basis that no venue existed in this Court.

(b) By oral Order on March 19, 1986, Hayse's constitutional and federal statutory claims under 42 U.S.C. §1983 were dismissed because the applicable statute of limitations had expired at the time this cause of action was commenced. The Court was without subject matter jurisdiction to entertain these claims, and cannot award him judgment on these claims.

(c) Reinstatement of Hayse is not a proper remedy not only because all his constitutional and federal statutory claims are time barred, but also because all the evidence at trial established that he is no longer qualified to be a professor at the University level.

(3) The Board and Stephensons' Motion for Judgment Notwithstanding the Verdict shall be, and it is, **SUSTAINED** on the following grounds:

(a) The evidence at trial was totally insufficient to support the jury's verdict. There was no evidence upon which reasonable minds could conclude that impermissible considerations were a motivating factor in the denial of tenure to Hayse, Crest Coal Company, Inc., v. Bailey, 602 S.W.2d 425 (Ky., 1980). Under the rationale of Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), Hayse failed to carry his burden of proof in establishing any right to recovery on his constitutional and federal statutory claims. Even considering all of the evidence in its strongest light in favor of him, and giving him the benefit of every fair and reasonable inference that the evidence can justify, reasonable minds could not have found on the basis of the evidence presented at trial that impermissible considerations were the motivating factor in the University's failure to grant tenure to him. Klingenfus v. Dunaway, 402 S.W.2d 844 (Ky., 1966); Commonwealth Dept. of Highways v. Pine Coal Co., 414 S.W.2d 134 (Ky., 1967).

(b) The un rebutted proof at trial showed that in the absence of any and all impermissible considerations, that Hayse still would not have been granted tenure. Under the rationale of Mt. Healthy, supra, the Board and Stephenson are therefore entitled to Judgment Notwithstanding the Verdict of the jury to the contrary. Crest Coal Co., supra. The record in this case establishes beyond doubt that the only fair and reasonable conclusion which can be drawn from the evidence is that Hayse would not have been granted tenure regardless of any impermissible considerations by Stephenson.

(4) As required by Civil Rule 50.03(1), we must determine whether the Board and Stephenson are entitled to a new trial should the Judgment Notwithstanding the Verdict entered herein be vacated or reversed on appeal. We are also required by Rule 50.03(1) to specify the grounds for granting or denying

the Motion. In compliance with the Rule, the Board and Stephensons' Motion for a New Trial shall be, and it is, **CONDITIONALLY SUSTAINED**, and a new trial shall be held should the Judgment Notwithstanding the Verdict entered be vacated or reversed on appeal. The basis for granting this Motion pursuant to Civil Rule 59.01 is because the verdict of the jury is not sustained by sufficient evidence, and is contrary to law within the meaning of C.R. 59.01(f) as set out in Paragraphs 2 and 3 of this Order.

Judgment in favor of the Defendants on the basis of the foregoing Order shall be entered forthwith.

This is a final Order and there is no just cause for delay.

This 2nd day of July, 1986.

/s/ Ray Corns

RAY CORNS, JUDGE

FRANKLIN CIRCUIT COURT

DIVISION I

FILED: March 19, 1986

FRANKLIN CIRCUIT COURT
CIVIL BRANCH
SECOND DIVISION

DR. JOSEPH MURRAY HAYSE

PLAINTIFF

V.

FINAL JUDGMENT NO. 79CI-0437

RE-INSTATING THE PLAINTIFF

BOARD OF TRUSTEES OF THE

UNIVERSITY OF KENTUCKY, et al

DEFENDANTS

Came the Plaintiff upon motion for re-instatement to his employment in the Honors Program at the University of Kentucky at the rank of associate professor, with tenure, effective at the beginning of the 1978-79 academic year, with re-employment effective at the beginning of the 1986-87 academic year, and the Court having heard the parties by counsel, and considered their legal authorities, as well as having considered the findings of fact of the jury herein, such jury being deemed an advisory jury for purposes of Plaintiff's claim in this regard, and the Court being sufficiently advised, IT IS HEREBY ORDERED AND ADJUDGED:

1. That the findings of fact of the jury herein are incorporated herein by reference as the findings of fact of the Court;

2. That by reason of such findings, the Court concludes that Plaintiff is entitled to re-instatement to his former employment at the level of associate professor, with tenure, in the Honors Program at the University of Kentucky, effective at the beginning of the 1978-79 academic year, with re-employment to begin at the beginning of the 1986-87 academic year;

3. That the Defendant Board of Trustees of the University of Kentucky be, and it hereby is, mandatorily enjoined and directed to re-instate Plaintiff, Dr. Joseph Murray Hayse, in the Honors Program at the University of Kentucky at the Lexington campus at the level of associate professor with tenure, effective at the beginning of the 1978-79 academic year and that the Defendant Board of Trustees be, and hereby is, mandatorily enjoined and directed to re-employ Plaintiff, Dr. Joseph Murray Hayse, in the Honors Program at the University of Kentucky at the Lexington campus at the level of associate professor, with tenure, effective at the beginning of the 1986-87 academic year, and thereafter;

4. That the Defendant Board of Trustees be, and it hereby is, mandatorily enjoined and directed to compensate Plaintiff upon re-employment of him beginning with the 1986-87 academic year, and thereafter, in accordance with the ordinary practices of the University in regard thereto;

5. That the Defendant Board of Trustees be, and it hereby is, mandatorily enjoined and directed to cause to be paid into Plaintiff's pension fund such sums as would have been paid by the Defendant Board of Trustees into the pension fund of Plaintiff beginning with the academic year of 1978-79 through the academic year of 1985-86, but for the acts of Defendant in depriving Plaintiff of his employment during that period of time;

THIS IS A FINAL JUDGMENT.

RAY CORNS, JUDGE

NOTICE OF ENTRY WAIVED:

ATTORNEY FOR PLAINTIFF

ATTORNEY FOR DEFENDANTS

FILED: March 19, 1986

FRANKLIN CIRCUIT COURT

CIVIL BRANCH

SECOND DIVISION

DR. JOSEPH MURRAY HAYSE

PLAINTIFF

V.

TRIAL, VERDICT

NO. 79CI-0437

AND FINAL JUDGMENT

BOARD OF TRUSTEES OF THE

UNIVERSITY OF KENTUCKY, et al

DEFENDANTS

IT APPEARING that trial was had herein before a jury, consisting of the following named jurors, to wit:

Tim Royce

Thomas Jackson

Sandi Thomas

Mark Mays

John Reheard

Gayle Arnold

Brenda Justice

Aloha Short

Jerry Sudduth

David Rogers

John Costigan

Lee Ruggles

commencing on Wednesday, January 29, 1986, and continuing on Thursday, January 30, 1986; Friday, January 31, 1986; Monday, February 3, 1986; Tuesday, February 4, 1986; Wednesday, February 5, 1986; and completed on Thursday, February 6, 1986, on issues of this action triable by jury;

AND IT FURTHER APPEARING that such jury rendered its unanimous verdict in all respects in favor of Plaintiff, Dr. Joseph Murray Hayse, and against the Defendants, Board of Trustees of the University of Kentucky and Dean John B. Stephenson, pursuant to the instructions submitted to such jury by the court, the same being attached hereto and incorporated herein by reference, and the Court being sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED:

1. That the verdict of the jury be, and the same hereby is, incorporated herein by reference;

2. That judgment be, and it hereby is, entered in favor of the Plaintiff, Dr. Joseph Murray Hayse, and against the Defendant, Board of Trustees of the University of Kentucky and Dean John B. Stephenson in the amount of Fifty Thousand One Hundred Thirty-Four Dollars and Twenty-Four Cents (\$50,134.24) as lost earnings, Five Thousand Eight Hundred Twelve Dollars and Eighty-Eight Cents (\$5,812.88) for damage to professional reputation and Five Thousand Eight Hundred Twelve Dollars and Eighty-Eight Cents (\$5,812.88) for damages for embarrassment, humiliation and emotional distress for a total judgment in the amount of Sixty-One Thousand Seven Hundred Sixty (\$61,760.00) Dollars;

3. That the Plaintiff, Dr. Joseph Murray Hayse, recover of the Defendants, Board of Trustees of the University of Kentucky and Dean John B. Stephenson, and each of them, the sum of Sixty-One Thousand Seven Hundred Sixty (\$61,760.00) Dollars, plus interest at the rate of Twelve (12%) Percent per annum, compounded annually, from the date of entry hereof, until paid, for all of which Plaintiff may have execution;

4. That Plaintiff recover his costs from the Defendants, and each of them;

5. That more than one claim for relief is presented by this action; that this Final Judgment is upon one or more but less than all of the claims presented by this action and it is hereby determined that there is no just reason for delay with respect to making this judgment a final judgment;

6. That this Court specifically reserves jurisdiction over all other claims presented by this action, including but not limited to, Plaintiff's claim for breach of and enforcement of his

contract with the Defendant Board of Trustees, Plaintiff's equitable claim for re-instatement to his employment with the Honors Program of the University of Kentucky at the level of Associate Professor with tenure, as well as Plaintiff's claim for attorneys' fees under 42 U.S.C. §1988;

7. That the clerk be, and she hereby is, directed to forward an attested copy of this Final Judgment including the instructions which include the jury's verdict to attorneys for Defendants:

Hon. John C. Darsie
 Hon. Gay M. Elste
 Office of Legal Counsel
 Room 2 - Administration Building
 University of Kentucky
 Lexington, Kentucky 40506-0032

and to attorney for Plaintiff:

Hon. William C. Jacobs
 173 North Limestone Street
 Lexington, Kentucky 40507

and

Hon. Frank G. Gilliam
 Security Trust Building
 Lexington, Kentucky 40507

THIS IS A FINAL JUDGMENT.

/s/ Ray Corns
 RAY CORNS, JUDGE

FRANKLIN CIRCUIT COURT
CIVIL BRANCH
SECOND DIVISION

CIVIL ACTION NO: 79-CI-0437

DR. JOSEPH MURRAY HAYSE PLAINTIFF
V.

BOARD OF TRUSTEES OF THE
UNIVERSITY OF KENTUCKY and
DEAN JOHN B. STEPHENSON DEFENDANTS

ORDER OF DISMISSAL

It appearing that the Defendants served certain motions on Plaintiff on January 22, 1986, accompanied by a notice for hearing on January 27, 1986, relating to the defenses of statute of limitations with respect to Plaintiff's claim under 42 U.S.C. §1983, venue, sovereign immunity and qualified immunity, all of which were properly raised by answer and pre-trial motion, and it further appearing that the jury trial had theretofore been set to commence on January 29, 1986, and that by reason of there having been insufficient time for Plaintiff to respond to such motions without postponing the scheduled jury trial, the Court passed decision upon such Defendants' motions until after trial, and it further appearing that after trial the parties submitted their respective Memoranda of Law, and a hearing on all pending motions was set by Order for March 19, 1986, and the parties having been heard by counsel, and the Court being sufficiently advised:

IT IS HEREBY ORDERED as follows:

1. The Defendants are not entitled to either sovereign immunity or qualified immunity, and in conformance with the Court's oral order on March 19, 1986, Defendants' pre-trial motions to dismiss on those grounds are hereby denied;

2. Venue over the Defendant, John B. Stephenson, does not properly arise in Franklin County on any of the claims asserted in either the Plaintiff's Complaint or any of the amendments thereto, and in conformance with the Court's oral order on March 19, 1986, Defendants' pre-trial motions to dismiss all claims asserted herein against the Defendant, John B. Stephenson, for lack of venue under KRS Chapter 452 are granted, and all of Plaintiff's claims against Defendant Stephenson are dismissed;

3. This Court has no jurisdiction to entertain the constitutional claims and claims arising under 42 U.S.C. §1983 asserted by Plaintiff in his Amended Complaint, served herein on May 6, 1981, and his Second Amended Complaint, served herein on March 7, 1985, because the applicable statute of limitations had expired as to those claims prior to the commencement of this action, and therefore, said Amended Complaint and Second Amended Complaint are dismissed with prejudice;

4. The Court has retained jurisdiction over the Plaintiff's contract claim asserted in his original Complaint, which claim is currently before the Court on Plaintiff's Motion for Summary Judgment (sic).

Entered this 24th day of March, 1986.

/S/ Ray Corns

JUDGE, FRANKLIN CIRCUIT COURT

TO BE ENTERED:
NOTICE OF ENTRY WAIVED

William C. Jacobs
173 North Limestone Street
Lexington, Kentucky 40507
Attorney for Plaintiff

/s/ Chauncey S. R. Curtz
Joseph H. Terry
Chauncey S. R. Curtz
Debra H. Dawahare
WYATT, TARRANT & COMBS
1100 Kincaid Towers
Lexington, Kentucky 40507
Counsel for Defendants

OPINION RENDERED: February 26, 1982; 10:00 a.m.

NOT TO BE PUBLISHED

FINAL

DATE MAR 19 1982 /s/Rena Founts

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

81-CA-1604-MR

DR. JOSEPH MURRAY HAYSE APPELLANT

V. APPEAL FROM FRANKLIN CIRCUIT COURT

HONORABLE SQUIRE WILLIAMS, JUDGE

ACTION NO. 79-CI-0437

BOARD OF TRUSTEES OF THE

UNIVERSITY OF KENTUCKY AND

DEAN JOHN B. STEPHENSON

APPELLEES

REVERSING

BEFORE: HAYES, CHIEF JUDGE, HOWERTON AND
VANCE, Judges.

VANCE, JUDGE. This is an appeal from a summary judgment which dismissed appellant's claim that promotion and tenure were denied him by appellees in violation of rights secured to him by the first and fourteenth amendments to the United States Constitution.

Appellant was employed by the university as an instructor for the 1971-1972 academic year and was reappointed in each of the three succeeding years. He was promoted to the rank of assistant professor and given a 2 year contract covering the years 1975-1976 and 1976-1977. The university classifies the final contract as a terminal employment contract.

It is admitted that the governing regulations and administrative regulations adopted thereunder with respect to tenure and promotion constitute a part of appellant's employment contract. It is further admitted that the university has adopted as a part of its regulations concerning promotion and tenure a document designated as a "procedural flow chart" which sets forth the stages through which a recommendation for promotion will be processed.

Under the applicable regulations the dean of a college is authorized to appoint, reappoint and grant terminal reappointments to the ranks of instructor and assistant professor without reference to an academic area advisory committee. He simply reports his action, in such instances, to the vice president for academic affairs.

The regulations further provide that "all recommendations for full-time appointments at the level of associate professor or above, with or without tenure, shall be supported by a file containing complete vita of the candidate, letters of evaluation from at least three qualified persons outside the university, the written judgment of each consulted member of the department in accordance with the governing regulations, a list of publications or comparable expressions of professional output and/or samples of the more significant professional contributions such as journal reprints. The recommendations of the chairman and the dean, with supporting file, shall be forwarded to the appropriate academic area advisory committee through either the vice president for academic affairs or the vice president for the medical center. A flow chart with further procedural comments is provided at the end of this administrative regulation. The academic area advisory committee will make its recommendation back to the appropriate vice president, who will add his recommendation and forward the complete file to the

president for his recommendation and subsequent action by the board of trustees."

Although appellant was serving the last year of what the university designated as a contract of terminal employment as an assistant professor the chairman of his department recommended him for promotion to associate professor with tenure. The dean of the college denied the request. In a consultation with the dean, the appellant contended that the dean had no authority to deny the promotion but must pass it on to the vice president for consideration and for recommendations of the academic area advisory committee and action by the president of the university and its board of trustees.

Thereafter the dean did submit the recommendation to the vice president but it was denied without having been submitted to the president of the university or the board of trustees.

Appellant claims that he was denied equal protection of law and due process because his recommendation for promotion was short-circuited and did not receive consideration from the university president or the board of trustees as provided by the regulations of the university.

The university contends that since appellant was on a terminal contract his contract simply expired and there was "nothing to flow" through the flow chart. We see no reason, however, why the university was precluded from considering the recommendation of the department head that appellant be promoted even though he was on a terminal employment contract. The appellant had a right to have his recommendation for promotion considered in the same manner as the regulations provide for for all other faculty members and a denial of that consideration is discriminatory and a denial of equal protection.

The university further contends that as a matter of practice and custom all recommendations for promotion are passed on

for higher review only in the event they are approved by the dean of the college. This is not the procedure established by the regulations which have been adopted and custom cannot be allowed to supercede the duly adopted procedures.

The appellant further claims that the reason his promotion application was cut short and denied was that an internal dispute was raging between the dean of the college and the head of his department and appellant was discriminated against because he was under the aegis of the head of the department. He claims that he has been penalized because of his exercise of his freedom of association.

These allegations were denied but the denial does not establish that no genuine issue exists as to the matter. We think the summary judgment should not have been issued and we remand for a determination of the merits on the authority of Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977).

Even though appellant's application did not receive the attention of the president of the university and its board of trustees, it does not follow that he would have received a promotion and tenure if his application had been considered by those officials. He is not entitled to any promotion if his application would have been disapproved in any event in the absence of constitutionally impermissible considerations.

According to the rationale of Mt. Healthy City Board of Education, *supra*, appellant is entitled to relief if he can show that constitutionally protected conduct was a substantial or motivating factor in the rejection of his promotion unless the university can then convince the trier of fact that appellant's promotion would have been denied anyway even if there had been no consideration of impermissible factors.

The judgment is reversed for further proceedings in accordance with this opinion.

ALL CONCUR.

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FILED

May 27 1981

Eunice Moore

Clerk Franklin Circuit Court

FRANKLIN CIRCUIT COURT

79-CI-0437

DR. JOSEPH MURRAY HAYSE

PLAINTIFF

V.

SUMMARY JUDGMENT

BOARD OF TRUSTEES OF THE

UNIVERSITY OF KENTUCKY

and DEAN JOHN B. STEPHENSON

DEFENDANTS

* * * * *

Plaintiff and defendants having moved for summary judgment, there being no genuine issue as to any material fact, and the Court being advised;

Is of the opinion the actions taken by the defendants were in accordance with the Governing Regulations and the Administrative Regulations of the University and did not amount to a breach of contract. Nor did they violate any constitutional right of plaintiff.

Now, therefore, it is hereby Adjudged that plaintiff's motion for summary judgment is overruled, defendants' motion for summary judgment is sustained, and Judgment in favor of defendants is hereby granted.

This, the 27th day of May, 1981.

/s/ Squire N. Williams Jr.

JUDGE, FRANKLIN CIRCUIT COURT
DIVISION TWO

SUPREME COURT OF KENTUCKY

88-SC-283-DG

88-SC-289-DG

BOARD OF TRUSTEES OF THE
UNIVERSITY OF KENTUCKY AND
DEAN JOHN B. STEPHENSON APPELLANTS
ON APPEAL FROM COURT OF APPEALS

V. 86-CA-1826

(FRANKLIN CIRCUIT COURT NO. 79-CI-437)

DR. JOSEPH MURRAY HAYSE APPELLEE

AND

DR. JOSEPH MURRY HAYSE CROSS-APPELLANT
ON APPEAL FROM COURT OF APPEALS

V. 86-CA-1902

(FRANKLIN CIRCUIT COURT NO. 79-CI-437)

BOARD OF TRUSTEES OF THE
UNIVERSITY OF KENTUCKY AND
DEAN JOHN B. STEPHENSON CROSS-APPELLEES
ORDER DENYING PETITION FOR REHEARING
OR MODIFICATION

Appellants/Cross-Appellees' Petition for Rehearing or
Modification of Opinion is denied.

Combs, Lambert, Leibson, Vance and Wintersheimer, JJ.,
concur. Angelis, Special Justice, and Gant, J., would grant the
Petition. Stephens, C.J., not sitting.

ENTERED: February 8, 1990.

/s/ William M. Gant
ACTING CHIEF JUSTICE

SUPREME COURT OF KENTUCKY

88-SC-283-DG

88-SC-289-DG

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(FRANKLIN CIRCUIT COURT NO. 79-CI-437)

BOARD OF TRUSTEES OF THE
UNIVERSITY OF KENTUCKY AND

DEAN JOHN B. STEPHENSON CROSS-APPELLEES

ORDER DENYING PETITION FOR MODIFICATION
OR EXTENSION

Appellee/cross-appellant's Petition for Modification or
Extension of Opinion is denied.

Angelis, Special Justice, and Combs, Gant, Lambert, Leibson,
Vance and Wintersheimer, JJ., concur. Stephens, C.J., not
sitting.

ENTERED: February 8, 1990.

/s/ William M. Gant
ACTING CHIEF JUSTICE

SUPREME COURT OF KENTUCKY

NO. 88-SC-283-DG

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BOARD OF TRUSTEES OF THE
UNIVERSITY OF KENTUCKY and

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V. ON APPEAL FROM COURT OF APPEALS

86-CA-1902

(FRANKLIN CIRCUIT COURT NO. 79-CI-437)

BOARD OF TRUSTEES OF THE
UNIVERSITY OF KENTUCKY and

DEAN JOHN B. STEPHENSON

CROSS-APPELLEES

APPELLEE/CROSS-APPELLANT'S PETITION FOR
MODIFICATION OR EXTENSION OF OPINION

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CERTIFICATE OF SERVICE

This is to certify that the Petition for Modification or Extention of the Opinion of Dr. Joseph Murray Hayse was served upon all parties hereto by mailing a true copy of same to Hon. John Darsie, Hon. Gay Elste, Office of Legal Counsel, Room 2 - Administration Building, University of Kentucky, Lexington, Kentucky 40506-0032; Hon. Chauncey S.R. Curtz, Hon. Debra H. Dawahare, Hon. Karen J. Greenwell, Wyatt, Tarrant & Combs, 1700 Lexington Financial Center, Lexington, Kentucky 40507; Hon. Richard Emmett, Hon. Robert Matthews, Hon. Barbara Hartung, Greenebaum, Doll & McDonald, 3300 First National Tower, Louisville, Kentucky 40202; Hon. John Scott, Clerk, Kentucky Court of Appeals, 403 Wapping Street, Frankfort, Kentucky 40601; Hon. Ray Corns, Judge, Franklin Circuit Court, Franklin County Courthouse, Frankfort, Kentucky 40601 on this the 29th day of November, 1989.

William C. Jacobs

STATEMENT OF POINTS AND AUTHORITIES

CR 76.32.	1
<u>Mt. Healthy City School District</u>	
<u>Board of Education v. Doyle,</u>	
429 U.S. 274 (1977).	1
A. The Trial Judge's Order Vacating Its	
Final Judgment Reinstating Hayse Should	
be Reversed.	1
CR 8.03.	3
B. Under The Law Of The Case And The <u>Mt.</u>	
<u>Healthy</u> Rule, Hayse's §1983 Remedy Is	
Reinstatement With Tenure And Promotion	
Rather Than <u>Ab Initio</u> Consideration By	
The Board Of Trustees Of His Application	
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1. The <u>Mt. Healthy</u> Remedy..	4
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81-CA-1604-MR.	4
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429 U.S. 274 (1977).	4, 5
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429 U.S. 274 (1977).	6, 7
<u>Pembaur v. City of Cincinnati,</u>	
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<u>Brown v. Jefferson County Police Merit Board,</u> Ky., 751 S.W.2d 23, 27 (1988).	7
<u>Hart Cty. Bd. Of Ed. v. Broady,</u> Ky.App., 577 S.W.2d 423 (1979)	8
Additional Modifications And Extensions Of The Opinion. . .	9
<u>Mt. Healthy City School District</u> <u>Board of Education v. Doyle,</u> 429 U.S. 274 (1977).	9, 10
<u>Will v. Michigan Department of State Police,</u> 491 U.S. ___, 109 S.Ct. ___, 105 L.Ed.2d 45 (1989).	9

Comes the Appellee/Cross-Appellant, Dr. Joseph Murray Hayse (Hayse) for his Petition for Modification or Extension of the Opinion under CR 76.32 and states that he is a party adversely affected by the Opinion of this Court (Appendix A, hereto). Hayse desires to point out and have corrected inaccuracies in statements of law and fact contained in the Opinion and to extend the opinion to cover matters in issue not discussed therein.

In that Hayse sought both damages and injunctive relief and the result reached in the Opinion granted damages and injunctive relief, Hayse does not question such result. Because Hayse is adversely affected by the form and nature of injunctive relief granted for the reasons stated below, he petitions this Court for a modification or extension of the Opinion rather than a rehearing. References to Appendices to Hayse's Combined Brief will be preceded by the abbreviation "Br." Appellants/Cross-Appellees, Board of Trustees and Stephenson, will sometimes be referred to collectively as "the University."

Hayse will show, first, that the trial court's judgment which vacated the Final Order reinstating Hayse should have been reversed because it was clearly erroneous, as being unsupported by either pleading or proof, and second, that under the law of the case doctrine and Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) that reinstatement of Hayse at the level of Associate Professor with tenure is the only proper remedy on his constitutional and §1983 claims.

A. The Trial Judge's Order Vacating Its Final Judgment Reinstating Hayse Should be Reversed.

This Court did not reach the issue upon which it granted discretionary review, i.e., whether the trial court correctly vacated its Final Order reinstating Hayse with tenure. Instead, this Court fashioned a remedy contended for by none of the parties, that of directing the trial court to enjoin the Board of Trustees to consider Hayse's application for tenure and promotion ab initio under the regulations pertaining to him at the time his application was denied.

The jury unanimously found on Hayse's 1st Amendment claim (1) that Dean Stephenson considered constitutionally impermissible factors, (2) that such consideration "was a substantial or motivating factor" in the rejection of Hayse's promotion to the rank of Associate Professor, with tenure, and (3) that the University did not prove "by a preponderance of the evidence, that Dr. Hayse's application(s) for promotion to the rank of Associate Professor, with tenure, would have been disapproved by the University in any event." (Br., Appx. R). Thereupon, the trial court entered Judgment reinstating Hayse with tenure and promotion. Thereafter, the trial court vacated its reinstatement Judgment.

The trial court's stated grounds for vacating its Judgment reinstating Hayse were: (a) the claims against Stephenson were dismissed on venue ground (resolved against the University at the Court of Appeals), (b) Hayse's constitutional and §1983 claims were barred by limitations (resolved against the University at the Court of Appeals

and Supreme Court), and (c) reinstatement is not a proper remedy because "all the evidence at the trial established that he is no longer qualified to be a professor at the University level." (Br., Appx. E, p. 3).

The issue asserted by the University in its motion for discretionary review going to this point is as follows: "The trial court correctly vacated its final order reinstating Hayse with tenure because he is no longer qualified to be a professor" (See University's Motion for Discretionary Review, p. 27).

Thus, the issue before this Court was whether the order of the trial court vacating its Judgment reinstating Hayse with tenure and promotion was clearly erroneous. As pointed out in Hayse's Combined Brief (which see at pp. 40-45) the University never pleaded lack of Hayse's qualifications to be a college associate professor as an affirmative defense as required by CR 8.03. No evidence was offered by the University at the trial or thereafter that Hayse lacked the qualifications to be a college associate professor. Therefore, the trial court's "finding" that its Order reinstating him with tenure and promotion ought to be set aside, as being unsupported by any evidence of Hayse's lack of qualifications, was clearly erroneous and must be reversed.

It was not only Hayse's Due Process rights that were violated. The jury also decided that Hayse's rights under the 1st Amendment (and the Equal Protection Clause) were violated. The deprivation of Hayse's 1st Amendment rights is not vindicated, if only his due process deprivation is vindicated by placing his application for tenure and

promotion before the Board of Trustees to decide whether tenure and promotion should or should not be granted.

By giving effect to the University's argument made for the first time at the appellate level, that this Court ought not permit Hayse to be reinstated because of the University's unsupported perception that Hayse is no longer qualified to be a professor, blurs the distinction between an appellate court and a trial court. Neither at the Court of Appeals nor at this Court did the Board of Trustees point to any pleading wherein it had asserted that "defense" nor any evidence supporting the University's position that Hayse is no longer qualified to be a professor.

The amicus brief of the University of Louisville urging that a University's "academic freedom" should operate to prevent Hayse's reinstatement is fallacious on its face. "Academic freedom" is a freedom accorded university professors, not the University itself.

Reversal of the Order vacating the judgment reinstating Hayse should carry with it an order directing the trial court to re-enter its Final Order reinstating Hayse.

B. Under The Law Of The Case And The Mt. Healthy Rule, Hayse's §1983 Remedy Is Reinstatement With Tenure And Promotion Rather Than Ab Initio Consideration By The Board Of Trustees Of His Application For Tenure And Promotion.

1. The Mt. Healthy Remedy:

Because of the unpublished opinion rendered February 26, 1982, in Hayse v. Board of Trustees, 81-CA-1604-MR, (hereinafter Hayse I) this case was tried to the jury under

the rationale of Mt. Healthy. Instruction No. II (Br., Appx. Q) instructed the jury that Hayse's rights under the Due Process Clause and Equal Protection Clause were violated. The jury was further instructed, however, that it did not follow that Hayse would have received promotion to the rank of Associate Professor with tenure if his application had been considered by the Board of Trustees. In accordance with the rule of Mt. Healthy, the jury was then instructed to find whether it believed from a preponderance of the evidence that "the Board of Trustees would have disapproved Hayse's application(s) for promotion to the rank of Associate Professor, with tenure, in any event, at the time when such application(s) should have been submitted to the Board of Trustees for its consideration." (Br., Appx. Q).

A unanimous jury was not convinced by the University's evidence that the Board of Trustees would have disapproved Hayse's application had it been submitted to the Board for its consideration when it should have been submitted. It follows then that the action which the Board of Trustees would have taken on Hayse's application was established as a fact for purposes of this case: the Board would have approved his application.

The principal holding of Mt. Healthy, is that the governmental employer is entitled to try to convince the fact-finder that it would have reached the same employment decision absent constitutionally impermissible factors. That is a purposeless exercise, if upon failure of the employer's proof, the employer is merely directed to go back and make the employment decision again.

At a Mt. Healthy trial, where the Plaintiff sustains his proof burden (as Hayse did), but the Defendant fails to sustain its burden of proof (as the University did) what is established is that but for the constitutional violations the Plaintiff would have been granted what he sought; here, Hayse would have been granted tenure and promotion. As the Mt. Healthy Court held, at 283, Doyle could "establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms." (Emphasis added).

The Mt. Healthy Court did not reverse because the reinstatement remedy granted was improper. It reversed because the reinstatement remedy was granted without the school board having had an opportunity to show that which the Board of Trustees was unable to convince the jury here, i.e., that it would have made the same employment decision despite the violation of 1st Amendment rights.

2. The Law Of The Case Doctrine:

As enunciated in Hayse I, "(Hayse) is entitled to relief" (Br.. Appx. A, p. 5) if Hayse bore his burden of proof under the Mt. Healthy rule, and the University failed to carry its burden of proof under that rule. Hayse proved that his exercise of 1st Amendment protected conduct was "a substantial or motivating factor in the rejection of his promotion" (Br. Appx. A, p. 5). The University failed to convince the jury, as required under the rationale of Mt. Healthy that Hayse's promotion would have been denied anyway. To be consistent with its application of the law of

the case doctrine, this Court must hold that reinstatement with tenure and promotion is the required remedy.

Under Instruction No. I (Br., Appx. R), (not contested on appeal) if the jury found that Stephenson violated Hayse's 1st Amendment rights, and found that the Board of Trustees would not have disapproved Hayse's application, the law was against both Stephenson and the Board of Trustees. See, Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) [Decision of governmental agent (empowered to make policy) though the decision was constitutionally infirm, was attributable to governmental agency for purposes of §1983 liability].

In Mt. Healthy the district court ordered Doyle reinstated with back pay resulting in tenure solely upon a finding that Doyle engaged in 1st Amendment protected conduct and was not rehired. The U.S. Supreme Court found no fault with the district court's remedy, but disagreed with the "rule enunciated by the district court (which) would require reinstatement in (such) cases ... even if the same decision would have been reached had the incident not occurred." Mt. Healthy, at 285.

Mt. Healthy did not hold nor did Hayse I hold that if the employer, here the Board of Trustees, failed to convince the fact finder that it would have made the same employment decision despite the constitutional violation that the matter is to be submitted to the employer, here the Board of Trustees, to decide what it would have done had the matter reached it for a decision. The jury here has already decided what the Board of Trustees would have done after hearing the evidence, and that is, that it

would not have rejected Hayse's application for tenure and promotion.

On authority of Brown v. Jefferson County Police Merit Board, Ky., 751 S.W.2d 23 (1988), a case decided on administrative law principles, the Opinion held that the denial of Hayse's "administrative due process" rights (Appx. A, p. 15) are to be vindicated by directing the Board of Trustees to consider his application for tenure ab initio under the regulations current when tenure was denied him. That limited remedy does not vindicate the deprivation of Hayse's 1st Amendment rights (or his Equal Protection rights). Only the due process deprivation may thereby be vindicated.

However, such limited injunctive relief bears the seeds of another lawsuit. The Board of Trustees has been a party to this action for over 10 years. It will be difficult, if not impossible, for the Board to eliminate from its collective mind the fact that this litigation has proceeded against it over the last decade. By attempting to vindicate Hayse's rights under the Due Process Clause under Brown, supra, a different due process violation may be generated. Hart Cty. Bd. Of Ed. v. Broady, Ky.App., 577 S.W.2d 423 (1979), wherein a principal's claim that the Board of

Education's decision to demote him was "predetermined," at 426, held:

It is axiomatic that the fair trial concept is deeply engraved into the due process requirements. Moreover, it is well established that 'a biased decisionmaker [is] constitutionally unacceptable [and] 'our system of law has always endeavored to prevent even the probability of unfairness.' (U.S. Supreme Court citation omitted).

Assuming the inevitable, that is, that the Board of Trustees will decide that Hayse's application for tenure and promotion is to be rejected, this litigation will not be at an end. Hayse will then be compelled to pursue the matter again at the circuit court level on the issue of whether Hayse's "application for tenure (was fairly) considered ab initio by the Board of Trustees under the rules and regulations pertaining thereto at the time tenure was denied him." (Opinion, p. 15).

The Board of Trustees conceded at the trial that Hayse met three (3) of the four (4) criteria upon which tenure and promotion decisions are to be based, i.e., teaching, University and public service and professional status and activity, contesting only the "research" criterion. The jury heard evidence that on his annual evaluations Hayse's research was rated higher than his teaching component. If this matter is submitted to the Board of Trustees and Hayse's application is rejected, as is to be expected, a new constitutional violation (in addition to the potential due process one) will have occurred in that Hayse's Equal

Protection rights would thereby be violated, and litigation will start anew.

If this Court declines to grant this Petition so as to direct the trial court to set aside its Order vacating its original Judgment of reinstatement, then the Opinion ought to be modified and extended so as to spell out with particularity the necessary safeguards to Hayse if the matter is to be considered by the Board of Trustees.

Additional Modifications And Extensions Of The Opinion:

1. The Opinion should be modified so that the statement that "Stephenson forwarded Hayse's file... ultimately (to) President Otis Singletary...." (Appx. A, p.4) is deleted. Hayse's file never reached the President for consideration. (Br., Appx. A., p. 4).

If Rehearing is not granted on Hayse's contention that under the law of the case doctrine and Mount Healthy the trial court should be directed to re-enter its Order reinstating him with tenure and promotion, then the Opinion should be modified to state that he is entitled to have "his application for tenure considered ab initio by the President and the Board of Trustees under the rules, etc." (Appx. A, p. 15).

2. This Court decided that sovereign immunity did not preclude prospective injunctive relief (Appx. A, pp. 14-15). The Opinion should be extended to include in its holding that Will v. Michigan Department of State Police, 491 U.S. ___, 109 S.Ct. ___, 105 L.Ed.2d 45 (1989) held that in §1983 actions, a state official sued in his or her official capacity, is a "person" for purposes of prospective

injunctive relief. At 105 L.Ed.2d 45, at 58, fn 10, the Will Court noted:

Of course a State official in his or her official capacity, when sued for injunctive relief, would be a person under §1983 because "official-capacity actions for prospective relief are not treated as actions against the State." Kentucky v. Graham, 473 U.S., at 167, n 14, 87 L.Ed.2d 114, 105 S.Ct. 3099; Ex parte Young, 209 U.S. 123, 159-160, 52 L.Ed. 714, 28 S.Ct. 441 (1908). This distinction is "commonplace in sovereign immunity doctrine," L. Tribe, *American Constitutional Law* §3-27, p. 190, n 3 (2nd ed 1988), and would not have been foreign to the 19th-century Congress that enacted §1983... (citations omitted).

WHEREFORE, Petitioner, Dr. Joseph Murray Hayse, demands:

1. That the Opinion be modified and extended so as to hold that the Order vacating the Judgment reinstating Hayse with tenure and promotion on the ground that he was no longer qualified to be a college associate professor be reversed as being unsupported by either pleading or proof;

2. That the Opinion be modified and extended so as to hold that the law of the case doctrine and Mt. Healthy require, in order that Hayse's deprivation of 1st

Amendment rights may be vindicated, that the appropriate injunctive relief is reinstatement of Hayse with tenure and promotion rather than merely a direction that the Board of Trustees consider Hayse's application for tenure and promotion;

3. That the Opinion be modified and extended in accordance with numerical paragraphs 1 and 2 on page 9 hereof;

4. Any and all other relief to which he may appear entitled.

• _____
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